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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73–599

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ALABAMA MICROWAVE, INC.	Docket No. 18691
For Construction Permits in the Domestic Public Point-to-Point Microwave Radio Service for the Establishment of Three New Stations at or Near Gadsden, Anniston, and Guntersville, Ala., and the Modification of One Existing Station, KRR71, at Huntsville, Ala.	File Nos. 1481 through 1484–C1–P–70
NEWHOUSE ALABAMA MICROWAVE, INC.	Docket No. 18692
For Construction Permits in the Domestic Public Point-to-Point Microwave Radio Service for the Establishment of the Three New Stations at or Near Birmingham, Pell City, and Anniston, Ala.	File Nos. 147 through 149–C1–P–70

APPEARANCES

George H. Shapiro and *Theodore D. Frank* on behalf of Alabama Microwave, Inc.; *Daniel M. Redmond* and *Richard F. Swift* on behalf of Newhouse Alabama Microwave, Inc.; and *Edmund M. Sciullo* and *W. Randolph Young* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted June 6, 1973; Released June 12, 1973)

COMMISSIONER REID FOR THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. This proceeding involves the mutually exclusive applications of Alabama Microwave, Inc. (Alabama) and Newhouse Alabama Microwave, Inc. (Newhouse) for authorization to construct video relay services in the Domestic Public Point-to-Point Microwave Radio Service to deliver the CBS network programs to television station WHMA–TV at Anniston, Alabama. Alabama would acquire the CBS network feed at Huntsville, Alabama, and relay it via a four-hop system to WHMA–TV. Newhouse would acquire the network feed at Birmingham, Alabama, and relay it via a three-hop system to WHMA–TV.

2. The applications were designated for hearing [1] on an issue providing for comparison of the proposals on the following factors: (a)

[1] Memorandum Opinion and Order released October 27, 1969, 34 F.R. 17674.

104–002—73——1

conservation of radio spectrum; (b) quality and reliability of service; (c) costs of construction and operation; and (d) charges, regulations, and conditions of service. In a Memorandum Opinion and Order, 21 FCC 2d 549, 18 RR 2d 475, released February 17, 1970, the Review Board added concentration of control issues against Newhouse, stating that evidence adduced thereunder, if not warranting disqualification, could be considered under the comparative issue. In an order, FCC 70–652, 23 FCC 2d 792, released June 26, 1970, the Commission denied the Chief, Common Carrier Bureau's application for review of the ruling but restricted the scope of the issue to the question ". . . whether the affiliation of the principals of Newhouse Alabama Microwave, Inc. with the media of mass communications in the Birmingham and Anniston, Alabama, areas involve any conflicts of interest which will adversely affect the reliability, effectiveness or reasonableness of the proposed service."

3. In an Initial Decision, 34 FCC 2d 675, released May 7, 1971, the presiding examiner, Charles J. Frederick, resolved the conflict of interest issue in favor of Newhouse.[2] On the comparative issue, he found that though the proposals were substantially similar on most counts, Newhouse was entitled to preferences in the areas of conservation of the radio spectrum, construction costs, and operating costs. In view thereof, the Examiner concluded that a grant should be made to Newhouse. The Review Board reversed the Examiner in a Decision, 34 FCC 2d 660, released May 3, 1972, and made a grant to Alabama. The Board held that Alabama was entitled to preferences in the areas of: (1) conservation of the spectrum; (2) charges, regulations and conditions of service; and (3) lower operating costs; that Newhouse was entitled to a preference for proposing lower construction costs; and that although Alabama's advantages are slight, it must be preferred under the comparative criteria. Further, the Board concluded that Newhouse's affiliation with numerous mass communications media in the area and the dominant position enjoyed by those media places Newhouse in a position which is replete with "possible, but nonetheless very real," conflicts of interest which could affect the reliability, effectiveness or reasonableness of the service; whereas no comparable situation is presented with respect to Alabama. In view of such potential conflict the Board assessed a significant comparative demerit against Newhouse. In light of the preferences awarded Alabama on a majority of the comparative factors and the comparative demerit assessed against Newhouse and a corresponding preference awarded Alabama on the matter of conflict of interest, the Board concluded that a grant to Alabama would better serve the public interest.

4. In an order, FCC 73–201, 39 FCC 2d 629, released February 23, 1973, we granted the application of Newhouse for review of the Board's

[2] A financial issue with respect to Alabama, added by Memorandum Opinion and Order of the Review Board, 22 FCC 2d 75, released March 17, 1970, was decided favorably to the applicant and that portion of the Initial Decision has not been challenged. Likewise, no question is raised in this appeal concerning the Examiner's determination that no preference is warranted for either applicant as to quality and reliability of service.

decision and set the proceeding for oral argument.[3] The argument was held before the Commission *en banc* on April 3, 1973. For the reasons which follow we are reversing the Review Board decision and making a grant to Newhouse.

COSTS OF CONSTRUCTION AND OPERATION

5. No party disputes the Examiner's finding that Alabama would have construction costs of $75,450 for its proposed four-hop system and that the Newhouse cost for a three-hop system would be $46,220.85; or his conclusion that Newhouse merits a preference in this area of comparison. A serious dispute exists, however, as to which, if either, applicant should be awarded a preference for operating costs. The Examiner favored Newhouse; the Review Board held in favor of Alabama. The principal differences involve the treatment which was accorded the items of maintenance costs and depreciation in Alabama's proposal.

6. In its application, Alabama had specified as the costs of operation the sum of $4,800 per year. However, no maintenance costs were included and Alabama contended that the inclusion of such an item under the circumstances of this case would be improper. At the present time Alabama pays Microwave Service Company (wholly owned by Alabama's president) $1,000 per month for the service and travel expenses of a technician from Tupelo, Mississippi, to service Alabama's present facilities (three microwave stations). If its proposal is granted, Alabama asserts, it will hire a technician to reside in Alabama and service the existing facilities (three stations) and the new facilities (three new stations)[4] at no greater cost than Alabama currently incurs; and it argues that consequently there is no logical reason for allocating any portion thereof to the proposed operation. The Examiner rejected this contention, however, and held that, based on the testimony of Alabama's president, one-fourth of the total cost of the technician, i.e., $3,000 annually, must be allocated to the Anniston proposal. On appeal, this item was eliminated by the Board, but we are aware of no authority for such action. It is an established principle of common carrier rate regulation that where facilities involve different services and rate bases, costs which cover more than one operation should be allocated among the services. Otherwise the customers of the existing services will, in effect, be subsidizing the new facilities and the customer of the latter will be getting a "free ride." Therefore, in the absence of some affirmative explanation by Alabama which justifies exceptional treatment, this general principle must be applied here.

[3] The order also granted a petition for leave to file a supplemental statement filed by Alabama. Pleadings referred to in the order were: (1) application for review filed June 2, 1972 by Newhouse; (2) Comments filed June 26, 1972 by the Chief, Common Carrier Bureau; (3) Opposition filed June 26, 1972 by Alabama; (4) reply filed July 17, 1972 by Newhouse; (5) Petition for leave to file a supplemental statement filed July 21, 1972 by Alabama; and (6) a statement filed July 28, 1972 by Newhouse.

[4] Alabama's existing Station KRR71 at Huntsville, Alabama will form the first link in the four-hop microwave system to relay the network feed to WHMA–TV at Anniston.

7. Alabama seeks to justify its failure to include maintenance costs on the ground that its operating costs were based on an incremental cost theory. It points out that in Docket No. 18128, the Commission has under consideration the question of whether, or the extent to which, incremental costs may be considered for ratemaking purposes (See *A.T. & T. Co.*, 18 FCC 2d 761); and it argues that an adverse determination of the applicability of this theory in the case under consideration is unwarranted. Alabama asserts that not only has the Commission never held the use of an incremental cost theory to be improper but, in fact, in The First Report and Order in Docket No. 18920 (*Specialized Common Carrier Services*, 29 FCC 2d 870, 916, released June 3, 1971) the Commission "clearly" indicated that it would be improper to express any opinion on the question of whether common carriers may set their rates on the basis of incremental costs prior to the conclusion of the Docket No. 18128 proceeding. In the event that the Commission ultimately determines that incremental costs are an impermissible basis for setting its rates, Alabama states, it will make such modifications in its tariff as may then be necessary but the Board's acceptance of the use of incremental costs is an insufficient basis for reviewing the Board's action.

8. The authorities relied upon by Alabama do not support its contention. This is not a ratemaking proceeding and our concern here is not whether Alabama employed appropriate accounting principles in computing a tariff. The pertinent question here is whether the evidence of record in this adjudicatory proceeding supports a comparative preference for Alabama on the subject of operating costs and we find that it does not. The "incremental cost theory" as a justification for omitting maintenance costs was advanced for the first time in Alabama's Reply Proposed Findings of Fact after the hearing. Consequently, Newhouse and the Bureau had no adequate opportunity to explore fully the subject at the hearing for the purpose of ascertaining whether the omission of maintenance costs was consistent with the manner in which other cost items were presented or whether other factors exist which negate the award of a comparative preference to Alabama on this criterion. The responsibility was Alabama's to produce all pertinent and relevant evidence in support of its application, and it may be accorded no advantage because some of the information extracted on cross-examination is sketchy in nature.

9. Moreover, the authorities on which Alabama relies made clear that a common carrier may not be permitted to gain a competitive advantage by shifting costs from one service to another. Thus in *A.T. & T. Co.*, *supra*, the Commission reiterated its concern that a service "for which there is no directly competitive service, . . . should not be burdened by, or required to subsidize, the so-called competitive services" (18 FCC 2d at 762). And in *Specialized Common Carrier Services*, while recognizing that it would be "premature and improper" therein to attempt a definitive resolution of the complex and controversial issues involved in pricing and costing of services, the Commission nevertheless "reaffirm[ed] our intention to follow ratemaking principles and practices which will be compatible with the maintenance of a competitive environment" (29 FCC 2d at 916). In the case under

consideration, Alabama clearly seeks to obtain a competitive advantage by having its existing services subsidize the cost of maintaining the proposed service but it may not be permitted to do so. Since one-fourth of the technician's time admittedly would be devoted to maintenance of the proposed service and the total cost of the technician is $12,000 annually, the sum of $3,000 must be allocated as a maintenance cost for the proposed service.

10. The second item omitted from Alabama's estimate of operating costs was depreciation. On cross-examination of Alabama's president it was brought out that no justification exists for the omission and that a depreciation cost must be added. Based on the witness's testimony that he proposed to use a straight-line method over eight years in determining annual depreciation, the Examiner added an $8,500 depreciation expense to Alabama's estimated operating costs. Newhouse used a sum-of-the-digits, six-year method in computing depreciation to arrive at an estimate of $10,566.28 for the first year and $8,749.08 for each of the next four years.[5] The Examiner concluded that in order to compare the proposals of the two applicants, the Newhouse depreciation figure must be revised by utilizing a straight line method with an eight year life. Utilizing this method the Examiner arrived at depreciation figures for Newhouse of $5,716 for the first year and $8,749 for each of the succeeding four years; and he awarded the preference on this criterion to Newhouse. Rejecting the recomputation, the Review Board held that each applicant must be judged on the basis of the figures computed by the applicants according to their own chosen methods (34 FCC 2d at 665). The Board found that Alabama's total operating expenses per year were $13,423; those of Newhouse, $15,916.28 for the first year and $15,999.08 for each of the next four years.

11. The Board's holding as to Newhouse's depreciation figures will not be disturbed. In all probability, Newhouse took its depreciation estimates into account in deciding on a five-year term and on other provisions of the contract with WHMA–TV, and for us to undertake a recomputation of the applicant's figures, which would improve its comparative position clearly would be inadvisable. On the other hand, we do not believe that Alabama may be accorded a preference merely because it employs a different system of bookkeeping. This is particularly true here where Alabama submitted no depreciation figures in advance, it had in its possession the depreciation figures of the competing applicant which had submitted complete and detailed information on the subject, and Alabama was therefore in a position to specify a method of computation and a depreciation figure which would be most advantageous to it. Whether Alabama intended such a result is immaterial. What is material is that it not be permitted to obtain a benefit from its failure to submit all necessary and relevant information in support of its application.

12. Adding $3,000 for maintenance to $13,423 per year annual operating cost for Alabama estimated by the Board, Alabama's total operating cost will be $16,423. Newhouse's annual cost as computed by the

[5] The Newhouse proposal provides for a five-year agreement with its customer.

Board is $15,916.28 for the first year and $15,999.08 for the next four succeeding years. Not only is the difference in cost small, but it results to a large degree from the different bookkeeping methods employed by the parties in computing depreciation. In these circumstances, we conclude that neither party merits a preference as to operating costs.

CHARGES, REGULATIONS, AND CONDITIONS OF SERVICE

13. The Board concluded that Alabama merited a preference on the criterion of charges, regulations and conditions of service for the following reasons: (1) that Alabama's proposed rate is lower than that of Newhouse ($15,300 per year for Alabama and $16,200 per year for Newhouse), and under the Board's recalculation of Alabama's operating costs (see par. 10, *supra*) the charge is realistic and capable of providing Alabama with a reasonable rate of return; and (2) the termination terms in Alabama's contract are more reasonable and also more advantageous to WHMA–TV. We reject both conclusions of the Review Board for the reasons set forth below.

14. Our disagreement with the Board's award of a preference to Alabama for its proposed lower rate to the customer stems from our determination that maintenance costs must be added to Alabama's estimated operating costs so that the latter is $16,423 rather than $13,423 as held by the Board. With such an annual operating cost, the service charge of $15,300 per year proposed by Alabama clearly would not be compensatory and consequently is inconsistent with Section 201(b) of the Communications Act.[6] At the oral argument of this case before the Commission, counsel for Alabama conceded that if the rate were not compensatory "our rates would have to go up. There is no question about that." Manifestly, therefore, Alabama's rates would have to be adjusted upward to cover its operating costs and to provide a reasonable rate of return on its investment; and no party may be permitted to gain a comparative advantage on the basis of an alleged rate which on its face is unrealistic.

15. Likewise, we find no valid basis for a preference to Alabama over Newhouse by reason of the terms and conditions proposed in their respective agreements with WHMA–TV.[7] With respect to the 10 year term of the Alabama agreement, as compared with the 5 year term proposed by Newhouse, the Board indicated that a fixed 10-year cost in an era of rising prices might be considered advantageous over a fixed 5-year cost. However, no assurance is provided to the customer that charges will remain unchanged for the entire contract period since, as stated above, the charges must be compensatory and they would in

[6] Section 201(b), in pertinent part, provides that "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, ____" and that they are unlawful if unjust or unreasonable. Since a non-compensatory rate would impose a burden on Alabama's existing services and result in the subsidization of the proposed service by the existing services, such a rate clearly would be unlawful.

[7] Alabama's proposed contract would run for a ten year term. Newhouse's for a five year term. Alabama's termination charge is the amount equal to non-recoverable costs incurred to the effective date of termination including construction, labor maintenance and fixed charges less 1/120 of this total for each month of use plus all dismantling costs. Newhouse proposes one of two methods of calculating the termination charge, whichever is less: (1) the full contract price less 1/60th for each month of use, or (2) all non-recoverable costs, including all dismantling, removal or modification costs.

all likelihood be raised if inflationary pressures caused an increase in operating costs. As for the differences in termination charges, they are without decisional significance in this case. First, it is undisputed that agreements for the type of service under consideration are rarely terminated prior to the expiration date specified in the contract. Furthermore, there are advantages and disadvantages to the termination provisions contained in both agreements. While it may be that Alabama's terms are more favorable during the first two or three years, the fact remains that the advantages, if any, are thereafter minimal and at the end of five years, the customer would be liable for no termination charges to Newhouse but such liability would continue for an additional five year period under the Alabama contract.[8] In our view no material weight should be accorded to termination charges in comparing the relative merits of the two agreements.

16. Thus, we find no distinctions of substance between the two proposals as to cost of the service to the customer, termination charges or other conditions of the proposed agreements, and we conclude that neither applicant is entitled to a preference on the criterion of charges, regulations and conditions of service. The disposition of this case, therefore, appears to turn primarily on whether the Review Board correctly concluded that Alabama should be given a "strong preference" and Newhouse a "significant comparative demerit" on the issue of conflict of interest, and that Alabama is to be preferred on conservation of radio spectrum.

CONFLICT OF INTEREST

17. As previously pointed out, we restricted the scope of the concentration of control issued added by the Review Board against Newhouse to an inquiry into whether affiliation of Newhouse principals with mass communications media in the Birmingham and Anniston areas would give rise to conflicts of interest adversely affecting the reliability, effectiveness or reasonableness of the proposed service. With respect to this modified issue the affiliation of Newhouse principals with the following area mass media interests are particularly pertinent:

(a) the licensee[9] of three Birmingham stations (radio stations WAPI(AM) and WAPI–FM, and television station WAPI–TV);

(b) The publisher[10] of newspapers in Birmingham (Birmingham News),[11]

[8] Newhouse alleges that at the end of three years, WHMA–TV would be liable to Alabama for a minimum termination charge of $52,770; whereas it would be required to pay Newhouse only $32,440 under one option and $46,220 under the other. In its opposition, Alabama does not dispute these figures but asserts instead that the reasonableness of the charge turns on the carrier's costs, not the customer's; and that, even assuming that Newhouse's figures are correct, Newhouse will receive a windfall under its termination change while Alabama's termination charge does not produce a comparable result. We find no merit to these contentions. In assessing the merits of the agreements proposed by the applicants for comparative purposes, all of the relevant and material factors must be taken into account. Therefore, we cannot ignore the fact that during a substantial portion of either agreement the cost to the consumer of an early termination is likely to be less under Newhouse's provisions than under Alabama's. In this connection we note also that, insofar as termination charges depend upon the payment of non-recoverable costs, Newhouse starts with a substantially lower construction cost ($46,220 as opposed to $75,450 for Alabama).

[9] Newhouse Broadcasting Corporation.

[10] Advance Publications, Inc. This company owns Advance News Service, Inc., a Washington, D.C. news agency to which the Birmingham News and Huntsville Times subscribe.

[11] The Birmingham News acts as agent for the Birmingham Post Herald in printing, circulation, and selling of advertising.

Huntsville (Huntsville Times), and Mobile (The Mobile Register, the Mobile Press and the Mobile-Press-Register);

(c) The operator [12] of a CATV system in Anniston; and

(d) The publisher [13] of five magazines circulated in the area.

18. Based in large part on the evidence concerning the Newhouse holdings the Board held that the applicant has a preeminent position in the 39 county area which is critical in this proceeding; that Newhouse must be in a closely competitive position with other sources of news and entertainment such as Station WHMA–TV; that as a supplier of the proposed microwave service Newhouse will also be a creditor of WHMA–TV; and that consequently an inherent potentiality for conflict would exist between Newhouse's role as broadcast licensee, newspaper publisher, CATV owner and creditor, on the one side, and provider of an essential network feed on the other. Since maintenance of the microwave carrier would be by technical personnel from WAPI–TV and from Newhouse's CATV at Anniston and no maintenance priorities had been enunciated by Newhouse, the Board found an added potential for conflict in the determination of which facility would be repaired first in the event of simultaneous outages. The Board stated that Newhouse had undertaken no affirmative showing of how it would vitiate potential conflicts and assure adequate service to WHMA–TV, but had provided only "a largely unembellished and self-serving statement that it recognizes and will abide by its responsibilities as a common carrier." As a suggestion of the kind of showing which Newhouse might have attempted, the Review Board cited the *Computer Inquiry*,[14] where the Commission, concerned with the possible adverse effect of ownership by common carriers of data processing affiliates upon the quality and reliability of their common carrier service, ordered maximum separation of the common carriers and their affiliates (i.e., separate officers, books of account, operating personnel, and equipment and facilities). In view of all of the foregoing, the Board concluded that Newhouse had not sustained its burden of proof on the conflict issue.

19. Newhouse objects to the Board's reliance on "potential" rather than "real" conflicts of interest, contending that the Commission intended the latter by its modification of the issue. However, we agree with the Board that the potential for adverse effects is the controlling consideration and that evidence of actual adverse results is not essential. In assessing the comparative merits of applications for proposed facilities, the Commission is almost invariably limited to the potential effects of a situation for the simple reason that no operation is in existence from which "actual" effects may be ascertained. Nor do we believe that the Review Board erred, as claimed by Newhouse, in assessing a comparative demerit against this applicant because of the potential for conflict where the customer will be dependent for its

[12] Cablevision Company, owned by New Channels Corporation which is in turn owned by Newhouse Broadcasting Corporation.

[13] Conde Nast Publications, Inc., which is owned 100% directly or indirectly by Advance Publications, Inc.

[14] *Computer Use of Communications Facilities*, 28 FCC 2d 267, 21 RR 2d 1591 (1971), reconsideration denied FCC 72–288, 34 FCC 2d 557, released March 30, 1972. Insofar as is here pertinent, the Court of Appeals for the Second Circuit in *GTE Service Corporation, et al.* v. *FCC* affirmed the authority of the Commission to issue the rules. Case Nos. 71–1300, *et seq.*, 26 RR 2d 901, decided February 1, 1973.

microwave feed upon a supplier which will be its competitor and creditor. No comparable situation exists with respect to Alabama. We do disagree, however, with the Board's award of a decisive preference to Alabama in this area of comparison.

20. The critical point as to this issue is not merely whether there is a possible conflict of interest due to Newhouse's affiliation with other media of mass communications in the area but whether such possible conflict has a substantial or reasonable likelihood of generating an adverse effect upon the quality or reliability of the service to be provided. As to this point, we believe that the substantial probative evidence of record is that there is little likelihood that the potential for an adverse effect upon service will materialize. The probability of simultaneous outages in more than one of Newhouse's facilities is of such unlikelihood that the necessity for making a choice between restoration of the common carrier service or service to its own broadcast station or CATV system will not frequently arise. Even if such a situation should occur, however, we believe that Newhouse has demonstrated a capability to meet such emergency situations. Overall technical control of the microwave system will be maintained by WAPI–TV's chief engineer located at the WAPI–TV transmitter site on Red Mountain, which is also the site of the first microwave station in Newhouse's three-hop system. At Anniston where the system terminates, Newhouse will operate a maintenance center with a microwave technician available to serve and maintain the microwave system. In addition, Newhouse employs a significant number of technicians in connection with the operation of its television station at Birmingham and its cable television system at Anniston who could be pressed into service in case of an emergency and who could reach any trouble area along the microwave route in a relatively short period of time. Thus, contrary to the Board's view, we find that Newhouse has taken ample precautions to meet serious emergencies and has demonstrated the capability and intent to keep the proposed microwave facilities in good operating condition; and we conclude that its affiliation with television, cable, and other mass media of communications in the area will not adversely affect the reliability, effectiveness or reasonableness of the proposed microwave service.[15]

CONSERVATION OF SPECTRUM

21. As to the criterion of spectrum conservation, the Review Board recognized that the use of one less frequency over a shorter path by Newhouse appeared to favor that applicant but it believed that this advantage was outweighed by other considerations. The Board held it to be more significant that Alabama had shown that it will be able to coordinate with Bell in such a way as to permit full utilization of the 6 GHz band by both Bell and Alabama, that Newhouse, under its plan, would not fully utilize the 6 GHz band, and that Bell would therefore be deprived of the channels used by Newhouse (34 FCC 2d at 663). While conceding that there is support for the finding that the

[15] The *Computer Inquiry* case upon which the Board relied involved a substantially different factual and policy situation, and it has no application here.

question of growth in this situation is not presently of pressing significance, the Board took the position that the policy of spectrum conservation is concerned with the prospects for long-term usage and conditions could change. Therefore, in view of its finding as to possible frequency blockage by Newhouse, the Board concluded that Alabama's proposal would result in a fuller utilization of the frequency spectrum and was to be preferred under this criterion.

22. Both Newhouse and the Common Carrier Bureau contend that the question of whether the Newhouse proposal would actually result in route blockage to Bell involves complex engineering considerations which were not resolved by the evidence of record in this proceeding; and that, in any event, Alabama's superiority in this respect was not shown and does not exist. They further assert that, irrespective of the resolution of this question, the Bell routes involved herein are not growth routes, that Bell is not likely to need the frequencies proposed by Alabama or Newhouse, and that the emphasis placed on route blockage by the Board is unwarranted. The use of one less frequency by Newhouse, the Bureau and Newhouse urge, is an overriding public interest consideration which calls for a significant preference to Newhouse. In its opposition, Alabama supports the Board's determination, contending that Alabama's system will have "less preclusive effect on the available spectrum space than Newhouse's."

23. There is considerable substance to the contention of Newhouse and the Bureau that insufficient technical information was adduced to sustain a finding that the Newhouse proposal would preclude full utilization of the 6 GHz band by Bell or that Alabama's proposal would result in fuller utilization of that band. However, we deem it unnecessary to rest our decision on that ground because frequency blockage is not a matter of decisional significance in this case. The record establishes, as the presiding examiner found, that the Bell route in the area in question is not a growth route and there is no indication that any significant change in the growth pattern is likely to occur in the foreseeable future. Thus it appears from the record before us in this proceeding that the channels which had been authorized for Bell in May, 1965 were sufficient for its purposes (Tr. 73–74). Under these circumstances we believe that the possibility of blockage to Bell is too remote to be accorded significant weight.

24. In our view, the factors which must be accorded substantial weight are the use of one less frequency by Newhouse than by Alabama and the absence of any special public interest considerations which would justify the approval of an application which will use a greater number of frequencies. The demand for frequencies in the 6 GHz band is constantly increasing and this situation may be expected to continue both because of the expanding need for terrestrial communications and because of the future need of such frequencies for domestic satellite communications. Of course, if Alabama had come forth with proof of substantial public interest benefits from its proposal which outweighed the use of an additional frequency, the significance of this difference in proposals would have been reduced or eliminated. However, Alabama has adduced no such proof. No unique or special service is proposed by either applicant

and, in fact, the two proposals are designed to perform like services to the same customer. It is undisputed that both proposals are equal in quality and reliability, and no other advantage will accrue to the customer or the public by Alabama's use of an additional frequency. In view of the foregoing, our determination that the factor of route blockage is not a material consideration in the circumstances of this case, and the importance which we attach to the conservation of the radio spectrum, we conclude that Newhouse merits a substantial preference under this criterion.

OVERALL COMPARISON

25. In most areas of comparison, we find little or no significant differences between the two applicants. Both the Board and the Examiner held that the parties are equal in the area of quality and reliability of service, and this determination has not been contested. Neither has any question been raised as to the award of a preference to Newhouse for construction costs, although we consider this preference to be of minor importance. With respect to the costs of operation, we disagree with the Board's award of a preference to Alabama and hold instead that a preference for neither applicant is warranted. For the reasons set forth herein, we likewise disagree with the Board's award of a preference to Alabama for charges, regulations, and conditions of service. The differences between the two applicants are insignificant and do not support a preference for either in this area of comparison.

26. With respect to the conflict of interest issue, the Board correctly held that the potential for conflict where the supplier of the microwave feed will be a creditor and a competitor of the customer must be taken into account. However, the provisions which Newhouse has made for the maintenance and repair of the proposed facilities and the number of technical personnel associated with its television and CATV operations which it has represented will be available for this purpose diminish the prospect of an adverse effect upon service to WHMA–TV despite the existence of a potential for conflict. Therefore, rather than the strong preference awarded to Alabama by the Board, we find that only a slight preference was earned by the applicant as to this comparative area. Finally, we come to the issue of conservation of radio spectrum which, as we have heretofore indicated, we believe to be a matter of considerable importance. In this area of comparison we have awarded a substantial preference to Newhouse. Since the two applicants are equal in most areas of comparison and each earned a slight preference on one criterion, it appears that the substantial preference to Newhouse for spectrum conservation is the controlling and dispositive consideration in this case. We therefore conclude that a grant of the Newhouse application will better serve the public interest.

27. On January 29, 1973, Alabama filed a petition for leave to amend its applications. In the petition, which is unopposed, Alabama requests acceptance of an amendment updating its financial showing

to indicate an extension of the expiration date of a bank commitment. The petition will be granted.

28. Accordingly, IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment submitted therewith IS ACCEPTED.

29. IT IS FURTHER ORDERED, That the Decision of the Review Board herein, 33 FCC 2d 660, released May 3, 1972, IS REVERSED.

30. IT IS FURTHER ORDERED, That the applications of Newhouse Alabama Microwave, Inc. for construction permits in the Domestic Public Point-to-Point Microwave Radio Service (File Nos. 147 through 149–CI–P–70) ARE GRANTED; and the applications of Alabama Microwave, Inc. (File Nos. 1481 through 1484–CI–P–70) for such authorizations ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
A. V. BAMFORD, CORPUS CHRISTI, TEX.	Docket No. 19089 File No. BPH-7006
A. V. BAMFORD, COLORADO SPRINGS, COLO.	Docket No. 19158 File No. BP-18467
ENID C. PEPPARD AND DONA B. WEST, D.B.A. BROCADE BROADCASTING CO., BOULDER, COLO.	Docket No. 19159 File No. BP-18470
For Construction Permits	

APPEARANCES

Richard J. Tarrant and *Lauren A. Colby*, on behalf of A. V. Bamford; *Ronald A. Siegel*, on behalf of Brocade Broadcasting Company; *Richard N. Riehl*, *Thomas B. Fitzpatrick* and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 11, 1973; Released July 16, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. This proceeding initially involved the mutually exclusive standard broadcast applications of Pettit Broadcasting Co. (Pettit), A. V. Bamford (Bamford), and Brocade Broadcasting Company (Brocade).[1] These applications were designated for hearing under various issues by Order, FCC 71-189, released March 9, 1971. By Memorandum Opinion and Order, 30 FCC 2d 810, 22 RR 2d 251 (1971), the Review Board added misrepresentation and Rule 1.65 issues against Bamford. Subsequently, the Commission by Memorandum Opinion and Order, 32 FCC 2d 773, 23 RR 2d 490 (1972), consolidated into this proceeding A. V. Bamford's previously designated application for a permit to construct a new FM broadcast station in Corpus Christi, Texas,[2] for the purpose of considering the effect, if any, of the evidence adduced under the misrepresentation and Rule 1.65 issues added, *supra*, against Bamford in this proceeding. On March 7 and

[1] The Pettit application was subsequently dismissed pursuant to the terms of a joint agreement between the applicants approved by the Presiding Judge by Order, FCC 72M-512, released April 18, 1972, 24 RR 2d 157.

[2] Bamford's Corpus Christi application (Docket No. 19089) was designated for consolidated hearing by Order, FCC 70-1220, released November 18, 1970, on financial and *Suburban* issues, as well as a comparative issue. At that point of time, there existed a competitive application which was subsequently dismissed at the competing applicant's request. Hearings were held, evidence was taken, and, by Order, FCC 72M-123, released January 27, 1972, the record in that proceeding was closed. In light of the fact that there are unresolved issues, action on Bamford's Corpus Christi application must await resolution of those issues.

April 18, 1972, hearing sessions were held at which evidence was taken concerning all issues relating to Bamford. Thereafter, the Presiding Judge, Administrative Law Judge Lenore G. Ehrig, by Memorandum Opinion and Order, FCC 72M–873, released July 11, 1972, granted a joint petition for approval of agreement, filed pursuant to Commission Rule 1.525 by Bamford and Brocade,[3] seeking the unconditional dismissal of Bamford's application for Colorado Springs and approval of partial reimbursement of Bamford's expenses by Brocade. The Presiding Judge also granted Brocade's petition for immediate grant.[4] Also on July 11, 1972, the Presiding Judge released a Partial Initial Decision in this proceeding, FCC 72D–44, in which site availability, financial, and air hazard issues, as well as the misrepresentation and Rule 1.65 issues specified against Bamford were resolved in his favor, with the result that Bamford was determined to be basically qualified. In reference to the Rule 1.65 and misrepresentation issues specified against Bamford, the Administrative Law Judge concluded that Mr. Bamford's failings in this regard were the result of an "error of omission" resulting in only a "technical violation" of Rule 1.65, that there was no deliberate misrepresentation or lack of candor and that, consequently, "absolute disqualification" would "constitute an improvident use of administrative discretion . . .".

2. The proceeding is now before the Review Board on exceptions filed by the Broadcast Bureau which are directed to only the Rule 1.65 and misrepresentation issues.[5] Bamford supports the Initial Decision. Oral argument was held before a panel of the Review Board on June 26, 1973. We have reviewed the Partial Initial Decision in light of the Broadcast Bureau's exceptions, Bamford's reply, the arguments of the parties, and our examination of the record.[6] In this regard, we find the Administrative Law Judge's findings of fact to be substantially accurate and complete, and her conclusions persuasive and adequately supported by the findings. Furthermore, the Presiding Judge has, in our opinion, adequately dealt with the arguments raised in the Bureau's exceptions; no useful purpose would be served by further discussion here. Therefore, except as modified in the rulings on exceptions contained in the attached Appendix, and upon finding that the public interest would be served thereby, Judge Ehrig's Partial Initial Decision is adopted.

3. Accordingly, IT IS ORDERED, That the Partial Initial Decision, FCC 72D–44, released July 11, 1972, IS AFFIRMED, and that

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[3] Under the terms of the applicants' agreement, reimbursement is to take place only if the outstanding character issues specified against Bamford are resolved in its favor, and a grant of Brocade's application is not contingent on approval of reimbursement.

[4] The Review Board, by Order, FCC 72R–266, released September 26, 1972, severed the application of Brocade from this proceeding but retained Brocade in hearing status as a respondent, due to the reimbursement provisions of the Brocade-Bamford joint agreement.

[5] The Bureau also filed an appeal, on August 25, 1972, from the Presiding Judge's Order, *supra*, to allow Bamford partial reimbursement.

[6] In light of the dismissal of Bamford's Colorado Springs application, the issue relating to other aspects of the applicant's qualifications are moot. However, the Section 1.65 and misrepresentation issues must be resolved prior to approving reimbursement and action on Bamford's Corpus Christi application.

the Broadcast Bureau's Appeal from the Judge's Order Allowing Reimbursement of A. V. Bamford, filed August 25, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON THE EXCEPTIONS OF THE BROADCAST BUREAU

Exception No.	*Ruling*
1, 4(a)	*Denied.* The Judge's exculpatory findings excepted to fairly reflect the record evidence, and under this circumstance we accord substantial weight to the Judge's observations and characterizations. While the facts relating to Bamford's failure to report the reduced value of his stock were sufficient for the purpose of enlarging the issues in this proceeding to include a misrepresentation issue, they fall far short of constituting substantial evidence that a misrepresentation, in fact, occurred on the basis of the evidence in this record, and, particularly, in light of the Judge's favorable demeanor findings. In this connection, we also accord substantial weight to the fact that Bamford did disclose the number of shares of stock, as well as the identity of such shares; under this circumstance, this information made it possible for the Commission and/or its staff to verify the value of the stock in evaluating Bamford's financial qualifications. Indeed, if Bamford intended to misrepresent, he would not have made such a full disclosure, but instead could have merely described the stock as marketable securities at a certain value. *Cf. Neil N. Levitt*, 24 RR 384 (1962) at 24 RR 391. See *NLRB* v. *Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951).
2	*Granted.* However, see ruling on exception #9.
3	*Denied.* The fluctuation in value does not negate the fact that as of the date of the balance sheet the figure specified by Bamford is his estimated value of this asset as of that particular date. In determining Bamford's financial qualifications, the question presented is the liquidity of such an asset, or its ability to provide funds to meet proposed commitments. See instruction b of Section III, page 3 of FCC Form 301 (April 1969), which states specifically that assets such as accounts receivable, which result from normal operation of a business, stocks of closed corporations, etc. "are not considered as a readily available source of funds without a specific showing that such assets can be relied upon to provide funds to meet proposed commitments." Since Bamford did not make this required "specific showing", it is patently clear that the Commission would in no way rely upon Bamford's estimated value of this asset as shown by his balance sheet. Hence, such estimated value would have no favorable effect on the disposition of the applications; instead it would have constituted one matter, among others, requiring the ultimate specification by the Commission of financial qualification issues.
4	*Denied.* The findings excepted to are adequately supported by the record. The additional findings are of no decisional significance. Contrary to the Bureau's position, Bamford was not required, on the basis of Commission practices, to substantiate, as of the time of the filing of these applications, the ability of his broadcast properties to produce the funds required to meet his commitments for these pro-

Exception No.	*Ruling*
	posals. As indicated in the ruling on exception #3, *supra*, the Commission does not consider such non-liquid assets as readily available sources of funds. On the basis of the Commission's existing practices and precedent, the inadequate information in these applications to support Bamford's estimated value of his broadcast properties would have required a supplementary showing by the applicant. Absent such a showing, the Commission would, and in fact did, designate the applications for hearing on financial qualifications issues. In light of the foregoing, the Board finds no merit to the Bureau's position that as of the time of the filing of the applications, "Bamford knew that he did not have the assets required for either or both of his applications, that he deliberately submitted balance sheets inaccurately presenting his financial capabilities, and that he made intentional misrepresentations and lacked candor in providing the Commission with information regarding his applications." See Bureau's Brief, page 6. *Cf. RKO General, Inc.*, 34 FCC 2d 265, 24 RR 2d 16 (1972).
5, 6, 7, 8	*Denied.* The substance of these exceptions is adequately contained in paragraphs 18–22 of the Findings and paragraphs 4 and 5 of the Conclusions of the Initial Decision. With respect to the Bureau's exception #5, the Board disagrees with its contention that "the complete absence from the Commission's designation Orders . . . of any mention of these commitments [the applicant's dual financial commitments] demonstrates with absolute clarity that the Commission was in fact misled by Bamford's failure to fully disclose his financial commitments." See page 8 of the Bureau's Brief. The short answer to the Bureau's position is that the cross-referencing in the applications negates an intent to misrepresent. *WPRY Radio Broadcasters, Inc.* (FCC 73–547, —— FCC ——, 27 RR 2d 1043, released May 30, 1973), cited by the Bureau at oral argument, is not, in our view, apposite here. In that case, the Commission attempted in three letters to elicit a satisfactory explanation of alleged violations of Section 315 of the Act. The responses were not only inadequate, but contained further misrepresentations. Here, on the other hand, there is no indication that the Commission ever sought to further clarify Bamford's financial proposals prior to designation; nor is there any evidence that Bamford did anything more than fail to fully set forth his precise plans of financing.
9	*Denied.* The conclusions of the Administrative Law Judge are reasonable inferences from the findings and, in fact, rebut most of the findings requested by the Bureau in this exception. Moreover, the Board does not believe that these circumstances suggested by the Bureau taken together lead to a conclusion of intentional misrepresentation. See, ruling on exceptions #1 and #4. Further, as noted by the Presiding Judge, the relative significance of the difference is minor. Moreover, the stocks bought by Bamford were in "odd-lot" quantities, Bamford's broker apparently called him, rather than vice versa, and Bamford was entirely out of the market by the time he filed his consolidated financing plan in October, 1971. These facts stand in contradiction to the Bureau's claim of an active and knowledgeable interest in the stock market on Bamford's part. Furthermore, as to Bamford's testimony at the hearing, the Board believes that his statements concerning current versus investment value indicate little more than confusion and faulty memory—particularly since Bamford himself supplied the letter with which he was contradicted.

Exception No.	*Ruling*
10	*Denied.* The Judge's conclusions in this regard are well reasoned and adequately supported by the record. See also *RKO General, Inc., supra.*
11	*Denied.* See ruling on exception #5. The Board agrees with the Broadcast Bureau that case precedent requires full disclosure of other pending applications and their interrelationship with respect to a financial proposal, and that Bamford's actions in this matter were short of compliance with Commissions Rules. The Board does not, however, believe that an inference of intentional misrepresentation can be drawn therefrom—particularly in view of the fact that each application did mention the other. Overall, the Board is again in agreement with the Presiding Judge that, while there have been technical violations of Rule 1.65 and Bamford has been careless and to some extent inept, the record does not support a finding of intentional misrepresentation.
12	*Denied.* The Board agrees with the Presiding Judge's determination that Bamford's failure to report the changing transmitter site costs was, due to its relatively minor nature, an error of judgment rather than of intentional misrepresentation. This interpretation is buttressed by the fact that Bamford did eventually purchase the original site at a lower price than was originally reported.
13	*Denied* for the reasons stated in the Partial Initial Decision and these Rulings on Exceptions. See also *Gross Broadcasting Company* (FCC 73-684), released July 6, 1973, —— FCC 2d ——.

104-002—73——2

F.C.C. 72D–44

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
A. V. BAMFORD, CORPUS CHRISTI, TEX.	Docket No. 19089 File No. BPH–7006
A. V. BAMFORD, COLORADO SPRINGS, COLO.	Docket No. 19158 File No. BP–18467
ENID C. PEPPERD AND DONA B. WEST D.B.A. BROCADE BROADCASTING CO., BOULDER, COLO.	Docket No. 19159 File No. BP–18470
For Construction Permits	

APPEARANCES

Richard J. Tarrant and *Lauren A. Colby*, on behalf of A. V. Bamford; *Ronald A. Siegel*, on behalf of Brocade Broadcasting Company; *Richard N. Riehl* and *Thomas B. Fitzpatrick*, on behalf of the Chief, Broadcast Bureau, Federal Communication.

PARTIAL INITIAL DECISION OF HEARING EXAMINER LENORE G. EHRIG

(Issued July 7, 1972; Released July 11, 1972)

PRELIMINARY STATEMENT

1. By Order released March 9, 1971, the Commission consolidated for hearing the standard broadcast applications of Pettit Broadcasting Co., A. V. Bamford, and Brocade Broadcasting Company. The Pettit application for Brush, Colorado, was subsequently dismissed pursuant to the terms of a Joint Agreement between the parties approved by the Examiner in an Order released April 18, 1972. As directed, publication was made and completed on May 10, 1972. No additional applications for Brush were filed within 30 days from the latter date.

2. The following issues had been designated by the Commission in its March 9 Order:

1. To determine the areas and populations which would receive primary service from the applicants and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.

2. To determine with respect to the application of A. V. Bamford:

(a) How the Applicant will obtain sufficient additional funds to construct and operate the proposed station for one year without revenue; and

(b) Whether in light of the evidence adduced pursuant to (a), above, the applicant is financially qualified.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by A. V. Bamford would constitute a hazard to air navigation.

4. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

5. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would best serve the public interest.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted.

3. By Order released June 23, 1971, the Review Board enlarged these issues to include the following:

(a) To determine whether A. V. Bamford in applications and related material filed with the Commission has made false and misleading statements and/or was lacking in candor.

(b) To determine whether A. V. Bamford failed to report substantial and significant changes within thirty days as required by Rule 1.65.

(c) To determine the effect of the evidence adduced pursuant to the issues herein upon the requisite and/or comparative qualifications of A. V. Bamford to be a Commission licensee.

4. By order released August 18, 1971, the Review Board further enlarged the issues in this proceeding to include a determination as to "whether A. V. Bamford has reasonable assurance of the availability of his proposed antenna site."

5. Finally, by Order released January 7, 1972, the Commission consolidated into this proceeding A. V. Bamford's previously designated application for a permit to construct a new FM broadcast station in Corpus Christi, Texas, "for the purpose of receiving evidence and the issuance of an Initial Decision regarding the issues specified by the Board in its Memorandum Opinion and Order, 30 FCC 2d 810, released June 23, 1971" (Issues (a) to (c), *supra*).

6. On March 7, 1972, a hearing session was held at which evidence was taken concerning all of the special Bamford issues. Additional evidence was received at a further session held on April 18. On May 1, 1972, the last documentary evidence on behalf of Bamford was submitted by letter.[1] Proposed findings of fact and conclusions were submitted by Bamford and the Broadcast Bureau. Reply findings were filed by Bamford.

7. On June 6, 1972, Bamford and Brocade jointly petitioned for approval of an agreement, filed pursuant to Section 1.525 of the Commission's Rules, looking toward the unconditional dismissal of Bamford's application for Colorado Springs, Colorado. Subject to the conditions of this agreement, Brocade agreed to a partial reimbursement of Bamford's expenses.

8. On June 13, 1972, Brocade filed a petition requesting that, upon approval of the aforesaid agreement between Bamford and Brocade, its application for Boulder, Colorado, be granted immediately without further hearing proceedings.

9. The Examiner will dispose of the joint request for approval of agreement, and Brocade's request for an immediate grant in a separate

[1] By letter dated May 9, 1972, counsel for Bamford moved the admission into evidence of Bamford Exhibits 20, 21 and 22. These documents had been served on all parties on May 1. No objections having been noted, Bamford Exhibits 20, 21 and 22 are received into evidence.

document to be released simultaneously with this Decision on the special Bamford Issues.

FINDINGS OF FACT

Bamford's financial qualifications (issue 2)

10. Although Issue No. 2 was framed in terms of Bamford's Colorado Springs application only, the Review Board in its June 23, 1971 Order construed this issue to require Mr. Bamford to establish his ability to construct and operate both of his proposals. The record reveals that Bamford will require the following funds to construct and operate his proposed Corpus Christi and Colorado Springs stations:

Corpus Christi	[2] $52,000
Colorado Springs:	
Down payment on equipment	6,430
Acquiring land	3,315
Buildings	10,000
Other items	9,000
Cost of first year operations	71,200
Total	99,945
Total funds required for both applications	151,945

[2] In the Corpus Christi proceeding, Bamford estimated his costs for that station at $50,105. Bamford Exhibit 1, Page 5, herein, which is Bamford's consolidated plan for financing the construction and first year's operation of both stations, earmarks $52,000 for Corpus Christi.

11. To meet these requirements, Mr. Bamford has the following in cash, liquid assets, and loans:

Cash	$85,414.12
Less: Loan security	10,000.00
Total	75,414.12
Cash value of life insurance	2,400.00
Bank loan	100,000.00
Total	177,814.12

Bamford, therefore, has $25,869.12 more than he will require to construct and operate both proposals.

Air hazard issue (issue 3)

12. On September 13, 1971, after designation for hearing, the Federal Aviation Agency determined that the Bamford proposal would not be a hazard to air navigation.

Misrepresentation and/or lack of candor, and 1.65 issues [issues (a), (b) and (c)]

13. These issues were added upon request of the Broadcast Bureau as the result of matters contained in Bamford's applications for Colorado Springs and Corpus Christi, subsequent amendments to both applications, and responses filed by Bamford in opposition to the Bureau's Petition to Enlarge.

THE MATTER OF THE VALUE OF BAMFORD'S STOCK

14. In its Order granting the requested enlargement, the Review Board stated that a substantial question of misrepresentation had been raised by virtue of Bamford's failure to reflect on his Corpus Christi balance sheet the reduced value of his stock. The facts in this regard are these:

15. The balance sheets filed by Bamford with his Colorado Springs and Corpus Christi applications, dated January 31 and October 1, 1969, listed certain stocks owned by him as having identical "current values" totaling $13,627.50. This valuation was accurate for the January 31, 1969 balance sheet. However, by October 1, 1969, the value of these shares had declined to $9,529.00, and by the time the Corpus Christi application was filed on January 30, 1970, their value was only $7,868.75. When the matter of these discrepancies in stock values was raised by the Broadcast Bureau in its Petition to Enlarge, Bamford, through his counsel, offered the following explanation:

> When Mr. Bamford prepared the January 31 balance sheet, he asked his broker to provide him with a list of those values. The October 31 [should be October 1], 1969 balance sheet was a mere "up-date" of the January balance sheet and Mr. Bamford—who runs a radio station for a living and does not pay much attention to his stocks—did not realize that there had been a fluctuation in his stock values. Admittedly, it would have been better to have re-checked the stock prices but the failure to do so did not constitute any attempt to hide anything from the Commission—as is obvious from the fact that the number of shares and identity of the securities were specifically disclosed.

16. On both direct and cross-examination at the hearing, Bamford evidenced confusion. He initially claimed that the use of the term "current value" was a mistake and that the value of the stocks listed on his balance sheets represented their actual cost. After his own counsel showed him a letter from his broker indicating that the figures on the January 31, 1969 balance sheet did indeed reflect the current value of these shares, Bamford testified that, not having experience in stocks, he had merely copied these prices onto his October 1, 1969 balance sheet. He explained that his stockholdings were never a very important factor in his financial picture, that he handles his transactions primarily by telephone, and that he has only seen his broker about three times over the past three or four years.

17. The Bureau correctly notes that, while Mr. Bamford admittedly did not recheck the value of his stocks when he prepared his second balance sheet, he did check and revise downward his liabilities. Mr. Bamford explained this at the hearing, stating, ". . . you check liabilities frequently. I never check the stocks and bonds. I have no use for them. They are not part of my life, and liabilities are (Tr. 235)."

THE MATTER OF THE DEPICTION OF BAMFORD'S TOTAL FINANCIAL OBLIGATION AND WHETHER RULE 1.65 WAS VIOLATED

18. The Review Board also noted in its Order enlarging the issues that in neither the Colorado Springs nor the Corpus Christi proceeding did Bamford provide a full and accurate picture of his financial

obligations. In particular, it noted the Broadcast Bureau's contention that Mr. Bamford failed to amend his Colorado Springs application, pursuant to Rule 1.65, so as to reflect substantial and significant changes regarding his Corpus Christi application. The facts are these:

19. On February 25, 1969, Mr. Bamford filed an application for a new standard broadcast station to be constructed at Colorado Springs, Colorado. In the financial plan submitted with that application, Mr. Bamford, after first setting forth that a net amount of $158,997 in cash would be required to construct and operate this proposal for one year, stated:

> Attached is a balance sheet of the applicant. The applicant will make any use of his assets which may be appropriate to furnish the required sum of $158,997.

The supporting balance sheet, dated January 31, 1969, listed assets totaling $252,340.04 and a net worth of $234,825.36. Included in these assets were: KEPO Broadcasting Company, Inc.—$103,898.79, and Frontier Square Corporation—$67,740.56. KEPO Broadcasting Company is the licensee of KBER-AM and FM, Mr. Bamford's stations in San Antonio, Texas. Frontier Square is a company owned by Mr. Bamford which he has used from time to time to produce live entertainment shows. Its value as listed in this 1969 balance sheet was based on gross income from prior years. Frontier Square was removed, however, from Mr. Bamford's balance sheet in 1971, because the corporation had become inactive.

20. At no time did Mr. Bamford intend to dispose of his San Antonio stations. Therefore, deducting the claimed value of KEPO Broadcasting Company and of Frontier Square, there is no question that Mr. Bamford's liquid assets fell far short of the amount required to meet his commitments. There is also no question that Mr. Bamford was neither an adroit nor a skilled witness. When questioned at the hearing concerning his financial plan, he appeared to vascillate from an admission that he had always planned to obtain a bank loan for Colorado Springs, to a statement that no bank loan was required. The truth of the matter seems to be, however, that at all times Mr. Bamford had in mind the fact that he owned a radio property, KBER-AM and FM, which grossed approximately $300,000 a year and which was conservatively valued at $600,000. Based upon this knowledge, he sincerely believed he could raise the sums needed to construct and operate his proposal, either from cash flow or by means of a loan.

21. On January 30, 1970, the application of Big Chief Broadcasting Company for a new FM station in Corpus Christi, Texas, was filed. Mr. Bamford was a 50% partner in this application. The Plan of Financing this FM proposal read as follows:

> . . . The partnership (Exhibit No. 1) has been capitalized at $100,000. Balance sheets demonstrating the ability of the principals to make their partnership contributions are attached hereto.

In support of this statement, a balance sheet of Mr. Bamford as of October 1, 1969 was submitted, listing substantially the same assets and net worth as were submitted earlier with his AM application. Although neither the balance sheet nor any portion of the application disclosed that these same assets were already fully committed by Mr.

Bamford to finance his Colorado Springs application, Section II of the application clearly revealed that Mr. Bamford had pending an application for an AM station in Colorado Springs. Moreover, on February 6, 1970, the Colorado Springs application was amended to reflect Mr. Bamford's interest in the Corpus Christi application. On January 4, 1971, Mr. Bamford reported that he had become the sole applicant for the FM station in Corpus Christi, and official notice is taken of the fact that the Colorado Springs application was amended on February 9, 1971, to so advise the Commission.

22. By the time the February 9, 1971 amendment to the Colorado Springs proposal was filed, the Corpus Christi application had already been designated for hearing. Less than a month later, the Colorado Springs application was also designated for hearing. On June 7, 1971, Mr. Bamford amended his Corpus Christi application to reflect a dedication of his cash and liquid assets first to this proposal, with the remainder to be used for the Colorado Springs application. The Colorado Springs application was amended on June 16, 1971 to reflect this. Later, a consolidated financial plan for the two proposals was submitted as an amendment to the Colorado Springs proposal, dated October 24, 1971.

The site availability issue

23. Mr. Bamford assumed an option for the purchase of the transmitter site originally specified in his Colorado Springs application. This option contemplated a purchase price of $17,500. The terms were: $1750 down payment and monthly payments of $131 principal plus 7% interest. Mr. Bamford renewed this option through March 31, 1970. He was late with his request to renew and was advised by the owner on April 20, 1970, that the property had been sold. On May 18, 1970, Mr. Bamford advised the Commission that his site was no longer available and that he was seeking a new one.

24. On April 25, 1970, the owner of Bamford's original transmitter site advised him that he had other property which might be suitable. An investigation was begun and an option to purchase one of these other properties was taken in June 1970. The terms of the option were: price $20,000, $2000 down payment, and a total of $200 per month plus 7% interest. Although the application was amended on July 22, 1970, to specify this new transmitter site, the financial portion of the application was not amended to reflect the increase in land costs. Bamford explained that he had not considered this a significant change coming within Rule 1.65.

25. Bamford renewed the option on his second site through December 19, 1970. By this time, he learned that his original site had become available. Rather than renew the option on site number two, he took a new option on his original site. This option, dated December 19, 1970, contemplated a total purchase price of $21,300 with a down payment of $2,300 and monthly payments of $220 plus 7% interest. Bamford amended his application on January 27, 1971, to specify the original transmitter site. Again, the financial portion of the application was not amended to reflect this increase in land cost. Bamford continued to renew the option on this property through December, 1971, at which time he elected to exercise his option. A warranty deed and deed of

trust were executed on January 25, 1972. Less land being involved, the final terms for the purchase of this site were $1,435 prepaid interest through January 25, 1973, and thereafter monthly principal and interest payments totaling $191.76 for 168 months. Mr. Bamford testified that he discussed the changes in his transmitter site with his attorney and was advised that it was not necessary to amend the financial sections of his application.

CONCLUSIONS

These conclusions are limited to the issues in this proceeding relating to the basic qualification of A. V. Bamford.

1. *Financial Qualifications.*—This issue was specified to determine whether Mr. Bamford has sufficient resources to construct and operate his proposals for a new FM station in Corpus Christi, Texas, and for a new standard broadcast station in Colorado Springs, Colorado. As the findings of fact reflect, Mr. Bamford will require $52,000 for his FM proposal and $99,945 to construct his AM proposal and operate it for a year without revenues. To meet this total requirement of $151,945, Mr. Bamford has established that he has cash, loans and liquid assets totaling $177,814.12. It is, therefore, concluded that he is financially qualified.

2. *Air Hazard Issue.*—After designation for hearing, a determination was made by the F.A.A. and the Commission's Antenna Survey Branch that Mr. Bamford's antenna proposal would not constitute a hazard to air navigation. Hence, this issue is resolved in Mr. Bamford's favor.

3. *Misrepresentation and/or Lack of Candor, and 1.65 Issues.*—One of the bases for the misrepresentation issue added by the Review Board was the matter of the identical value of Mr. Bamford's stock holdings as listed on his January and October 1969 balance sheets submitted to the Commission in connection with his Colorado Springs and Corpus Christi applications, respectively. The record reveals that Mr. Bamford did not recheck the value of his stock before preparing his October 1969 balance sheet, but merely duplicated the listing contained in his previously filed balance sheet. It also reveals that if Mr. Bamford had rechecked, he would have discovered a decrease in the value of his stock amounting to approximately $4,000. This sum does not loom large when compared on the one hand with the $150,000 which Mr. Bamford needed to finance both stations, and on the other hand, with the substantial value of Mr. Bamford's principal asset, KEPO Broadcasting Company. With this in mind, the Examiner finds no motive for Mr. Bamford to have deliberately inflated the value of his securities on his second balance sheet by $4,000. She accepts, instead, Mr. Bamford's explanation concerning his failure to recheck, namely, that he simply never gave it a thought. The Examiner thus concludes that while Mr. Bamford certainly should have rechecked these values before preparing his second balance sheet and is admonished for not having done so, there is no basis for concluding that this was anything more than an error of omission.

4. A second question was raised as to whether Mr. Bamford's failure to depict his total financial obligation to both his Colorado Springs

and Corpus Christi applications constituted a violation of Rule 1.65. The record reveals that at the time Mr. Bamford filed his Colorado Springs and Corpus Christi applications, he was aware that he had failed to show exactly how he would get the money to build and operate these stations. The Examiner accepts Mr. Bamford's explanation that at all times he felt he could develop a satisfactory consolidated plan for financing both proposals based upon his use of his major asset, KEPO Broadcasting Company, as a means of obtaining the necessary liquid assets. It appears that Mr. Bamford believed that his failure to develop such a plan at the outset would result in nothing more than the inclusion of a financial issue in each of his hearings, which he felt he could meet at the appropriate time. The fact that Mr. Bamford had difficulty in formulating his plan and that it took time to accomplish it, does not call into question his good faith in prosecuting his two applications simultaneously.

5. While it is concluded that there was a technical violation of Section 1.65 by reason of Mr. Bamford's failure to file statements in each application giving the exact cost requirements of the other application, the Examiner does not believe such violation constitutes grounds for disqualifying Mr. Bamford, especially in light of the fact that he carefully cross-referenced each application to the other.

6. Mr. Bamford also failed to amend his Colorado Springs application to reflect changes in expected land costs which came about when he had to change his transmitter site. His explanation was that he did not believe the change in costs was significant within the meaning of 1.65. In this regard, too, it is concluded that although Mr. Bamford did violate Section 1.65, the violation cannot be deemed to be so serious as to adversely affect his character qualifications. Absolute disqualification, as urged by the Broadcast Bureau, would, in the Examiner's view, constitute an improvident use of administrative discretion especially where, as here, the Examiner has found no deliberate lack of candor and/or misrepresentation. The Examiner frankly notes that if this case were in the posture of a comparative hearing rather than in its final stage as a result of settlement negotiations, there is little doubt that Mr. Bamford would have been admonished and accorded a comparative demerit, but not an absolute disqualification, in regard to his understanding of and compliance with Rule 1.65. For a well reasoned discussion of the position that violation, *per se*, of Section 1.65 should not require absolute disqualification see the dissenting statement of Review Board member Sylvia D. Kessler, in *Gross Broadcasting Company*, FCC 72R–126, released May 3, 1972, and the cases cited therein.

7. *Site Availability Issue.*—The record establishes that Mr. Bamford has, and has had a transmitter site available to him for his Colorado Springs proposal, except for a limited period in 1970 when he advised the Commission he was seeking a new site. The site availability issue is, therefore, resolved in Mr. Bamford's favor.

In sum, based upon the foregoing, IT IS CONCLUDED that the issues in this proceeding relating to Mr. Bamford's basic qualifications are resolved in his favor.

FEDERAL COMMUNICATIONS COMMISSION,
LENORE G. EHRIG, *Hearing Examiner.*

F.C.C. 73-697

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice to
BEL AIR BROADCASTING CO., INC., BEL AIR, MD.
For Apparent Liability for Forfeiture

JUNE 27, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

BEL AIR BROADCASTING CO., INC.,
Licensee of Standard Broadcast Station WVOB,
2 Hays Street,
Bel Air, Md.

GENTLEMEN: This letter constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

On January 31, 1973, five individuals filed a complaint resulting in a Commission inquiry into the operation of your station. The complaint, filed and transmitted over the signature of Payson Getz, joined as complainants Wilmer N. Barnes, Robert F. Hicks, James F. O'Neill, and Joseph G. Bogdan. All of these individuals, during the pertinent period involved here, were members of the Bel Air, Maryland, Board of Town Commissioners. Barnes and Hicks, however, also were incumbent candidates for reelection to membership on that Board in an election held on December 4, 1972.

Among their charges, complainants alleged that you violated Section 73.123(c) of the Commission's Rules.[1] The facts issuing from the Commission's inquiry, relative to this charge, disclosed that WVOB broadcast the following editorial on December 1 through 4, 1972:

> Perhaps never in the history of the Town of Bel Air has a Town election been so important to insure the future of our community. The existing Board has gone to great lengths in past issues of the local newspaper to emphasize that they were not so-called puppets to a power regime. The truth of the matter lies within the fact of why they should have to go to such lengths to point out they are individuals when it could have been done more effectively through their independent actions.
>
> Conversations on the streets of Bel Air indicate considerable displeasure with the current Board and some of their tactless decisions of the past. Included among these are the popular private meetings or executive sessions, which only creates a credibility gap between the constituents and their elected officials. It's difficult for us to subscribe to this week's endorsement of the existing Board members by a local newspaper. It is even less advisable when residents of Bel Air cannot move around town during the rush hours of Friday and Saturday because of the

[1] By letter of February 28, 1973, the Commission's Broadcast Bureau stated that complainants had failed to provide substantial extrinsic evidence that you had deliberately distorted the content of your February 15, 1972, newscast and determined, therefore, that no further Commission action on this part of their complaint was warranted. The fairness doctrine aspect of their complaint is currently under study by the Commission's Broadcast Bureau.

traffic patterns. Where are the solutions that this Board should have come up with, during the past two years? Why does the Chairman of the Board feel it is so important for him to attend the National Mayors Conference in Honolulu and how much did it cost the taxpayers for him to go? These are all questions that the Bel Air resident is asking. We believe that the voters of Bel Air should look upon Monday's election as a chance to institute a change. Fortunately, all of the registered candidates have their strong points, but some far exceed others in experience and motivation. It is the editorial opinion of this station that a change is necessary and urge you to vote for that change Monday, December 4th. This has been a WVOB Editorial.

Complainants alleged that this WVOB editorial was broadcast "approximately hourly" on the dates cited above, a charge you neither acknowledge nor attempt to refute. It is undisputed that WVOB failed to notify complainants that the editorial was to be broadcast on the dates cited and further failed to provide complainants with a script or tape of the editorial and an offer of a reasonable opportunity to respond at any time prior or subsequent to the broadcasts of the editorial. Complainants Barnes and Hicks assert that the editorial constituted a licensee editorial opposing their candidacies as Section 73.123(c) uses those terms, and that because the station failed to provide them with prior notification, a script or tape of the questioned editorial and an offer of an opportunity to state views contrary to those expressed in the editorial, prior to the broadcasts, the licensee violated the express commands of Section 73.123(c).

You reply by contending that in the editorial "no candidate was personally endorsed and no candidate was personally opposed"; that no violation had occurred; and that the Rule would have become operative only if the challenged editorial had "named a candidate either way." Had a candidate been named in the commentary, you say, you "would have given them 72 hours notice and free air time." You conclude by stating that even though the station made no effort to meet the Rule's requirements prior to the editorial's broadcast, the "standard disclaimer" was made offering interested parties an opportunity to reply, but that no party requested such reply.

Section 73.123(c) of the Commission's Rules declares that a licensee which broadcasts an editorial opposing a legally qualified candidate for office at any time within 72 hours prior to the day of an election has the affirmative duty to comply with the Rule's procedural requirements in subparts (a), (b) and (c) "sufficiently far in advance of the broadcast" so that the candidate or candidates opposed can be given a "reasonable opportunity to prepare a response and present it in a timely fashion." [2]

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[2] In its entirety, Section 73.123(c) of the Rules, 47 C.F.R. 73.123(c), reads:
73.123 *Personal attacks; political editorials*

* * * * * * *

(c) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The primary question to determine is whether the editorial that complainants question constituted the type of licensee editorial opposing a legally qualified candidate contemplated by the Rule. The facts disclosed by the inquiry indicate that the editorial was in fact such a statement of licensee opposition and that your failure to fulfill the Rule's requirements "sufficiently far in advance" of the December 1 through 4, 1972, broadcasts of the editorial indicate your apparent failure to comply with the Commission's political editorial Rule. As noted above, only two of the five seats on the Bel Air Town Board were involved in the election on December 4, but of the seven candidates for those seats two were incumbents—Barnes and Hicks. Although the editorial did not mention Barnes and Hicks by name, it clearly urged their defeat and made statements whose only inference could have been that these two individuals, as members of the Town Board, deserved defeat in the December 4 election because they had failed to resolve Bel Air's traffic problems and because of the Board's alleged practice of holding nonpublic meetings during their tenure on the Board. The editorial in the course of its discussion stated that "It's difficult for us to subscribe to this week's endorsement of the existing Board members by a local newspaper. . . . We believe that the voters of Bel Air should look upon Monday's election as a chance to institute a change . . . It is the editorial opinion of this station that a change is necessary and urge you to vote for that change Monday December 4." Such explicit statements urging voters to cast their ballots for a change in the composition of the Town Board when two members of the then existing Board were seeking reelection to the vacated seats can only be considered as a statement of opposition to the candidacies of Barnes and Hicks, the incumbents, even though these candidates were not expressly identified by name in the editorial.

After considering the facts and arguments relative to this matter, it appears that you have willfully or repeatly violated Section 73.123 (c) of the Commission's Rules by failing to comply with obligations set forth in the Rule, prior to the broadcasts of the editorial on December 1 through 4, 1972. Therefore you are subject to forfeiture pursuant to Section 503(b)(1)(B) and have incurred an apparent liability in the amount of $3,000.

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $3,000 made payable to the Treasurer of the United States.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–714

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A. BURNS, RIEKE AND VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP–17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA	Docket No. 19597 File No. BP–19134
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. Under consideration are: (a) a petition filed November 6, 1972 by Burns, Rieke and Voss Associates (BRV) for reconsideration of the Commission's Memorandum Opinion and Order, FCC 72–858 (37 FR 200) released October 5, 1972; (b) a petition for leave to amend filed November 6, 1972 by BRV; (c) an opposition to the petition for reconsideration filed December 11, 1972 by the Chief, Broadcast Bureau (Bureau); (d) an opposition to the petition for leave to amend filed December 7, 1972 by the Bureau; (e) an opposition to the petition for reconsideration filed December 11, 1972 by Braverman Broadcasting Company, Inc. (Braverman); (f) a reply to the oppositions to the petition for reconsideration filed January 15, 1973 by BRV; (g) a reply to the oppositions to petition for leave to amend filed January 15, 1973 by BRV and an errata thereto filed January 23, 1973.

2. The captioned applications for a new standard broadcast station at Iowa City, Iowa, were designated for comparative hearing by a Memorandum Opinion and Order FCC 72–858 released October 5, 1972. Shortly prior to the issuance of our designation order, BRV had filed an engineering amendment to its application specifying a new antenna site and a new directional antenna design.[1] In support of its amendment, BRV also tendered a new set of radiation patterns which it characterized as "standard" in lieu of the theoretical patterns submitted with its original application. That portion of the amendment relating to the radiation patterns was rejected on the ground that they did not comply with Section 73.150(b)(1)(i) of the Rules which provides that an antenna design incorporating a loss resistance in excess of 1 ohm is unacceptable in the absence of an adequate technical justification for employment of the greater value. Although BRV's original

[1] The BRV application was tendered for filing on July 27, 1967 and it was accepted for filing on October 21, 1971. See *Burns, Rieke and Associates*, 32 FCC 2d 175, released October 28, 1971. The amendment was tendered on September 11, 1972.

application had been filed prior to the effective date of the standard pattern requirement of Section 73.150 so that the use of theoretical patterns was permissible, it was considered that BRV must meet the specifications in Section 73.150 if it elected to rely on standard rather than theoretical patterns. The balance of the amendment was accepted. The designation order further provided that since the new site is less than 1000 feet from the one originally specified and only a minor disparity between the areas and populations of the two sites was indicated, the disposition of the amended proposal would be made on the basis of the engineering data presented with the original application.

3. BRV requests reconsideration of the designation order to the extent that the radiation patterns submitted with its amended proposal were rejected. It argues that it had a right to amend its application prior to designation, that rejection of its radiation patterns was improper, and that use of the original theoretical patterns with its amended proposal deprives it of a hearing on the proposal which it intended to have considered by the Commission. Since it had the option to rely on either theoretical or standard patterns, it argues that it should not have been held to strict compliance with Section 73.150 and that the patterns submitted with its amended proposal should have been accepted. In the alternative, BRV requests that the Commission grant leave to amend the application and accept an amendment tendered with its petition for reconsideration. It alleges that the tendered amendment presents a traditional theoretical pattern for the new directional system specified in its amended proposal. Procedural as well as substantive grounds have been advanced in opposition to our consideration of BRV's petitions.[2] However, we believe that BRV has raised substantial questions which may be decided only by the Commission, and which must be resolved before hearing; and we shall therefore consider its petitions on the merits.

4. As BRV contends, compliance with the provisions of Section 73.150 is mandatory only with respect to applications tendered after February 22, 1971, the effective date of the Rule[3] and, consequently, it had the option to use theoretical patterns rather than standard patterns in support of its proposed amendment. Having elected to specify standard patterns, however, its showing was required to be in accordance with Section 73.150 which clearly prescribes the method to be used in calculating proposed radiation patterns. Also, if it desired to design a pattern with a loss resistance greater than one ohm, the applicant could have done so provided adequate technical justification was presented, but no such justification was submitted. These provisions were incorporated in the rules over a year before the September 11, 1972 amendment was tendered, and BRV is in no position to claim that it did not have adequate notice of the requirements of the Rule. Having failed either to compute the standard patterns in accordance with the requirements of Section 73.150(b)(1)(i) or to present ade-

[2] Reliance is placed in part on the provisions of Section 1.106(a)(1) of the Rules which limits a petition for reconsideration of a designation order to "an adverse ruling with respect to petitioner's participation in the proceeding." We believe that petitioner raises questions which are within the spirit, if not the letter, of this provision. If error was committed, any hearing under the outstanding designation order is likely to be a nullity.

[3] See *Standard Method for Calculating Radiation Patterns*, 27 FCC 2d 77, at 87–88, released January 18, 1971.

quate technical justification for not doing so, the BRV radiation patterns were unacceptable, and they were properly rejected.

5. BRV further argues that, by reason of certain facts peculiar to this case, it had reason to believe that its standard pattern presentation was acceptable and that it is therefore entitled to special relief. It asserts that on June 5, 1972 the Commission granted the application of KGVO Broadcasters, Inc. of Missoula Montana, File No. BP 19211, for a minor change of facilities which presented a standard pattern with a limitation on radiation identical in form to the amended engineering proposal submitted in this case. Apparently the position was taken in the KGVO case that since the application was for a minor change and therefore was excepted from the provisions of Section 73.150, strict adherence to the computation provisions was unnecessary The Bureau concedes this to be so but asserts that KGVO was the first case to be processed after the adoption of Section 73.150; that the position therein taken has been abandoned in order to preserve the integrity of the Rule; and that in any application which specifies a standard radiation pattern, whether for a minor or a major change, the pattern must now be calculated in accordance with all of the requirements of Section 73.150. Citing *KGMO Radio-Television, Inc.* v. *Federal Communications Commission*,[4] 119 U.S. App. D.C. 1,336 F. 2d 920 (1964), BRV argues that it should not be prejudiced by internal shifts of Bureau policy and that it is entitled to reasonable notice of the form of presentation which would be acceptable and an opportunity to make reasonable corrections which would make it so. The Commission erred, it states, in designating the application for hearing without first giving the applicant an opportunity to present acceptable engineering data.

6. Some distinguishing features exist between *KGMO Radio-Television* and the case under consideration. The Court in *KGMO Radio-Television* rested its decision on the ground that "appellant had no notice, in the Commission's past decisions or otherwise, that more would be required, . . .". Here, the method for computing standard radiation patterns was explicitly set forth in a Commission rule which had been promulgated long before BRV's amended proposal was submitted. Furthermore, we believe it to be significant that BRV did not rely on any decision containing an analysis of the facts and a statement of Commission policy but on the disposition—without analysis or comment—of one case by the Broadcast Bureau pursuant to delegated authority. So far as the pleadings and the briefs of the parties indicate, KGVO Broadcasters, which employed the same engineering consultant as BRV, is the only applicant which was permitted to deviate from the requirements of Section 73.150 in its showing of standard radiations. Also we note that in the Report and Order adopting new Rule 73.150, we stated that "minor changes will be accomplished pursuant to exist-

[4] In the cited case, the Commission denied a protesting party's petition for reconsideration of a grant without hearing of a construction permit for a competing broadcast facility on the ground that the petition did not contain information in sufficient detail to warrant a hearing on the question of whether the economic effect of another station would be detrimental to the public interest. The Court reversed since the Commission had given no prior notice that more detailed information would be required and it held that petitioner was entitled to an opportunity to amend and amplify its petition.

ing procedure" but that the new requirements would apply to "applications for construction permits for new stations and major changes in existing stations filed after the effective date of the rule amendments adopted herein" (27 FCC 2d at 87). Thus we considered minor changes as being in a different category than applications for new stations and manifestly action taken with respect to applications in one category does not necessarily mean that the action will be taken with respect to applications in the other. For all of the foregoing reasons we do not believe that BRV or its consulting engineer was justified in placing such absolute reliance on the Bureau's disposition of *KGVO Broadcasters* which involved a minor change or that the Court decision in *KGMO Radio-Television* is controlling here.

7. As previously stated, we hold that the patterns submitted by BRV with its September 11, 1972 amended proposals were properly rejected since they were represented as "standard" patterns but were not computed in accordance with the provisions of Section 73.150. Nevertheless, we believe that some consideration should be given to BRV's reliance on the Bureau's acceptance of the KGVO showing despite noncompliance with Section 73.150 in connection with the applicant's petition for leave to amend. As BRV points out, it was never advised that its patterns were unacceptable and it was not given an opportunity to provide either theoretical patterns or standard patterns computed in accordance with Section 73.150 in support of its amended proposal before the amended application was designated for hearing. In these circumstances we find that the good cause required by Section 1.522(b) of the Rules has been shown for its failure to submit the proposed amendment before designation and that the proposed amendment may be allowed if otherwise acceptable. Braverman and the Bureau contend that the proffered amendment is deficient and unacceptable but we express no opinion with respect to their contentions. Under Section 0.341 of the Rules the disposition of a petition for leave to amend after designation for hearing is a matter for initial determination by the officer presiding at the hearing and we see no reason to assume jurisdiction of the matter at this time. We shall therefore refer the petition for leave to amend to the presiding Administrative Law Judge for his consideration.

8. Accordingly, IT IS ORDERED That the petition for reconsideration filed November 6, 1972 by Burns, Rieke and Voss Associates IS DENIED.

9. IT IS FURTHER ORDERED That the petition for leave to amend filed November 6, 1972 IS REFERRED to the presiding Administrative Law Judge for his consideration in accordance with the views expressed herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73–722

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CAPITAL CITY TELEVISION, INC., ASSIGNOR and HOLTER BROADCASTING CORP., ASSIGNEE For Assignment of License of Station KBLL, Helena, Mont.	BAL–7840

JULY 3, 1973.

CAPITAL CITY TELEVISION, INC.,
2301 Colonial Drive,
Helena, Mont.

GENTLEMEN: This is with reference to the assignment of license of AM Station KBLL, Helena, Montana, from Capital City Television, Inc. to Holter Broadcasting Corporation (BAL–7840).

In your last license renewal application (BR–941, granted 4/14/71), you proposed a normal maximum of 18 minutes of commercial programming during any 60-minute period; that "occasionally" during certain stated circumstances, (i.e. at election time, and "periods of high commercial activity such as Christmas and Easter") you might carry a higher level, but in no event, higher than 20 minutes. Your commercial programming during the composite week, however, did not follow your proposals. First, you proposed to exceed the 18 minute maximum only 10% of the weekly broadcast hours, yet you exceeded it in 20 hours, or more than 16% of the 123:48 hours in the composite week. Secondly, your proposed 20 minute per hour absolute maximum for special circumstances was exceeded 10 times during the composite week. In fact, you exceeded 22 minutes on four occasions, and 24 minutes on 2 occasions.

In response to the staff's inquiry regarding these violations of your stated commercial policies, you stated that the composite week commercial levels were atypical and you explained that most of the overcommercialized hours occurred during (a) the state basketball tournament on March 18, 1972, and (b) on April 28, 1972, "during a period of unusual commercial activity by local merchants" during which "normal sales control procedures broke down, resulting in oversales for nearly every segment of the day". You state that "following this incident, sales control procedures were strengthened and employees were instructed in the modified procedures so as to avoid a recurrence."

In further amendments to this application, you presented data which demonstrates that overcommercialization continued repeatedly after these incidents and even after the filing of the instant assignment ap-

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plication. You admit that the control procedures that you instituted did not completely prevent a recurrence of these events.

Based on analysis of a special week in May 1972 (requested by the staff) and other information submitted by the assignor, it appears that the composite week contained not more, as you stated in the application, but fewer hours where commercial matter exceeded 18 minutes, than the station normally carried during the period covered by the composite week. In fact the week of May 21 to May 27, 1972 showed 36 hours or 29% of the total weekly hours, contained in excess of 18 minutes of commercial matter or almost twice the number of overages reported for the composite week. Moreover, in 25 hours of the special week the commercial matter exceeded 20 minutes (your absolute maximum) and the hours with extremely high levels of commercial matter (23 to 26½ minutes) far exceeded the overages reported for the regular composite week.

In your 1971 application for renewal of KBLL's license the composite week analysis showed commercial overages. Based upon your assurances that appropriate procedures were implemented to prevent the recurrence of those violations of your commercial policy statement, the Commission granted your renewal application for a regular term. Thus, the overages reported in the instant assignment application show a pattern of repeated failure to adhere to the representations made to the Commission regarding the maximum levels of commercial matter to be carried by KBLL. The extent of this repeated conduct evidences a failure of the licensee to exercise adequate supervision and control over the operation of the station and a callous disregard of express assurances and representations made to this Commission.

However, in view of the fact that this assignment application will result in the separate ownership of KBLL and KBLL–TV, Helena's only television station, thus fostering the "one-to-a-market" policies adopted in Docket 18110; and the fact that the proceeds from this sale will be utilized to upgrade the KBLL–TV facilities and put it on a self-sustaining basis, we have decided that the public interest would be served by a grant of this application. We here remind you and put the assignee on notice that represntations as to maximum levels of commercial material are considered by the Commission as serious and binding representations. Accordingly, the commercial practices of Station KBLL will be carefully scrutinized at the time its next renewal application is filed.

Commissioner Johnson dissenting, Commissioner H. Rex Lee not participating and Commissioner Wiley concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73–631

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re COASTAL CABLE, INC., PORT O'CONNOR, TEX. For Certificate of Compliance	CAC–1788 TX 308

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE ABSENT.

1. On January 3, 1973, Coastal Cable, Inc., filed an application for a certificate of compliance in which it proposed to operate a new cable television system at Port O'Connor, Texas, an unincorporated community located outside all television markets. The applicant proposes to carry the following television signals:

KPRC–TV (NBC), Houston, Tex.
KUHT (Educ.), Houston, Tex.
KHOU–TV (CBS), Houston, Tex.
KTRK–TV (ABC), Houston, Tex.
KHTV (Ind.), Houston, Tex.
WOAI–TV (NBC), San Antonio, Tex.
KENS–TV (CBS), San Antonio, Tex.
KSAT–TV (ABC), San Antonio, Tex.
KIII (ABC), Corpus Christi, Tex.
KZTV, (CBS), Corpus Christi, Tex.
KRIS–TV (NBC), Corpus Christi, Tex.
KXIX (ABC), Victoria, Tex.

The proposed signal carriage is consistent with the cable television rules, and the application is unopposed.

2. Since Port O'Connor is an unincorporated community, the applicant contends that it cannot submit a formal cable television franchise. The local governing body, the Commissioners Court of Calhoun County, Texas, authorized Coastal Cable to use public rights of way and easements to construct and operate a cable television system, subject only to the following conditions: (a) that Coastal Cable will comply with all applicable federal, state and local laws; (b) that Coastal Cable will "raise, lower, move, or alter the route of its lines" upon written request of the Commissioners Court. Nonetheless, no franchise or other appropriate authorization within the contemplation of Section 76.31 of the Commission's Rules was obtained or submitted.

3. In the absence of a franchise, Coastal Cable has made the following representations to the Commission: (a) Construction of the system will be completed within six months of Commission certification; (b) the initial monthly rate will be $8.50 per month, subject to change only after a public hearing; (c) a local business office will be maintained for the assistance of its subscribers; (d) all pertinent federal, state and local laws will be observed, and all amendments thereto will be followed.

4. In a letter dated May 7, 1973, Mr. J. C. Davis, Assistant Attorney General of Texas, advised in pertinent part that:

> You requested the opinion of this office as to whether a county Commissioners Court in the State of Texas can legally grant a franchise to a cable television system in an unincorporated area of the county.
>
> The provisions of Article 4399 of Vernon's Civil Statutes, copy of which is enclosed, prohibit this office from giving you an official opinion on your question. However, in the State of Texas the Commissioners Court may only exercise such powers and jurisdiction over all county business as is conferred upon them by Constitution or statutes. *Von Rosenberg* v. *Lovett*, 173 S.W. 508, 511 (Tex. Civ. App. 1915, error ref.;); *Roper* v. *Hall*, 280 S.W. 289, 291 (Tex. Civ. App. 1925); *Childress County* v. *State*, 127 Tex. 343, 92 S.W. 2d 1011, 1016 (1936); *Canales* v. *Laughlin*, 147 Tex. 169, 214 S.W. 2d 451, 453 (1948); and *Hill* v. *Sterrett*, 252 S.W. 2d 766, 769 (Tex. Civ. App. 1952, error ref. n.r.e.). In the instant case the Commissioners Court does not have constitutional or statutory authority to grant a franchise to a cable television system in an unincorporated area. What is more, there is no State board or local political subdivision that can grant such a franchise or permit in this State.

5. We believe Coastal Cable has submitted an "acceptable alternative proposal" which assures compliance with the substance of Section 76.31 of the Rules.[1] Therefore, a certificate of compliance will be issued, valid until March 31, 1977, subject to the same conditions we have imposed in other, similar cases[2]: (a) this grant is subject to compliance with any further conditions the Commission may order as the result of proceedings intended to resolve the problems inherent in this vacuum of regulatory authority; or (b) as the result of further orders specifically directed to this case should additional matters be brought to our attention which warrant such action in the public interest.

6. The Commission has great concern with situations such as we see in the present case where there is no local governmental body with jurisdiction to issue cable television franchises. *See Mahoning Valley Cablevision, Inc.*, 39 FCC 2d 939 (1973). We do not wish to inhibit the development of cable television in areas where there is no franchise authority; on the other hand, our hope for "creative federalism" and "structured dualism," para. 177, *Cable Television Report and Order*, 36 FCC 2d 143 (1972), is somewhat emasculated where the local governments are not able to undertake their portion of the regulatory framework. For example, the proposed subscriber rates in the present application—$8.50 per month—seem high compared to the going rate in the industry. Yet, under the Commission's rules, the franchise authority is expected to specify or approve initial subscriber rates. Our

[1] Para. 116, *Reconsideration of the Cable Television Report and Order* FCC 72-530, 36 FCC 2d 326, 366.

[2] E.g., *Mahoning Valley Cablevision, Inc.*, FCC 73-347, —— FCC 2d ——.

grant of a certificate of compliance in the present case does not imply Commission oversight or approval of the initial rate proposed by the applicant. The Commission's regulatory plan also indicates that rates charged to subscribers shall not be changed "except as authorized by the franchising authority after an appropriate public proceeding affording due process." Section 76.31(a)(4) of the rules. The applicant in the present case has stated that changes in rates will be made only after a public hearing, but since there is no franchise authority we are not clear on the forum for such proceeding. These are merely two of the numerous gaps in the regulatory scheme for cable television in cases where there is no franchise authority and we must rely, instead, on an "acceptable alternative proposal." We urge the states to move quickly to remedy the situation in these areas where they have not as yet designated what appropriate governmental body is vested with authority to regulate cable television. In the meantime, we intend to remain alert to the problems inherent in such incomplete implementation of our plans for regulation of cable television.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–1788) filed by Coastal Cable, Incorporated, Port O'Connor, Texas, IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-635

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COMMUNITY TELE-COMMUNICATIONS, INC., SCOTTSBLUFF, NEBR.	CAC-786 NE006
COMMUNITY TELE-COMMUNICATIONS, INC., GERING, NEBR.	CAC-787 NE042
COMMUNITY TELE-COMMUNICATIONS, INC., TERRYTOWN, NEBR.	CAC-788 NE043

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT

1. Community Tele-Communications, Inc. operates cable television systems at Scottsbluff, Gering, and Terrytown, Nebraska, all within the Scottsbluff, Nebraska smaller television market. The systems now serve over 3,500 subscribers with the following television broadcast signals:

KDUH-TV (NBC/ABC, Channel 4), Hay Springs, Nebr.
KSTF (ABC/CBS/NBC, Channel 10), Scottsbluff, Nebr.
KTNE-TV (Educ., Channel 13), Alliance, Nebr.
KWGN-TV (Ind., Channel 2), Denver, Colo.
KOA-TV (NBC, Channel 4), Denver, Colo.
KRMA-TV (Educ., Channel 6), Denver, Colo.
KMGH-TV (CBS, Channel 7), Denver, Colo.
KBTV (ABC, Channel 9), Denver, Colo.

The systems' operator has filed applications for certificates of compliance to add the following signals to its present carriage:

KTLA (Ind., Channel 5), Los Angeles, Calif.
KHJ-TV (Ind., Channel 9), Los Angeles, Calif.
KTTV (Ind., Channel 11), Los Angeles, Calif.
KCOP (Ind., Channel 13), Los Angeles, Calif.

In its applications, Community argues that the four requested Los Angeles independent signals are grandfathered by virtue of an unopposed notification of carriage, allegedly filed on September 3, 1970, pursuant to former Section 74.1105 of the Commission's Rules.

2. Timely opposition to the captioned applications was filed by Duhamel Broadcasting Enterprises, licensee of Station KDUH-TV, Hay Springs, Nebraska. Duhamel argues, first, that the Community systems, already carrying one independent signal, have met the signal complement specified in governing Section 76.59 and, secondly, that

applicant's grandfathering argument is without merit because 1) no notice of carriage dated September 3, 1970 has ever been received by Duhamel and 2) no such September 3, 1970 notice is on file with the Commission. Duhamel explains that on December 1, 1970, Community did send notice of its intent to carry these four Los Angeles signals on the systems at Scottsbluff and Gering. Both Duhamel and Frontier Broadcasting Company, then the licensee of Television Broadcast Station KSTF, Scottsbluff, filed timely objections to the December 1, 1970, notice, thereby invoking the mandatory stay provisions of former Section 74.1105(c). These two petitions (SR–17104 and SR–17119) were dismissed as moot following the adoption of the Commission's new cable television rules. Duhamel refers to the "Joint Statement" filed by Community on February 1, 1971, with respect to both of the aforementioned petitions, where it stated:

> On December 1, 1970, Community . . . notified interested parties in accordance with Section 74.1105 of the Rules that their CATV systems would add the signals of independent Los Angeles television stations KCOP–TV, KHJ–TV, KTLA and KTTV.

It is argued by Duhamel that, in light of the circumstances and the above-quoted statement by Community, it must be presumed that no notice was given on September 3, 1970 and that the only notice filed pursuant to former Section 74.1105 was that dated December 1, 1970, to which timely objections were filed.

3. Following Duhamel's objection, Community submitted a letter to the Commission in which it admitted an "inaccuracy" in its applications for certificates of compliance and stated that it could not claim grandfather rights to the four requested Los Angeles independent signals. We agree.

4. We further note that Wyneco Communications, Inc., which recently assumed control of KSTF, Scottsbluff, sent a letter to the Commission in which it 1) refers to its predecessor's timely objection to applicant's December 1, 1970 notification, 2) acknowledges the receipt of a copy of applicant's letter to the Commission withdrawing its claim to previously asserted grandfather rights, 3) maintains that carriage proposals made by Community are inconsistent with Section 76.59, and 4) requests that the Commission deny the captioned applications.

5. Section 76.59 of the Rules permits cable systems located in smaller markets to carry one independent television signal, absent grandfathering rights, waiver, or required carriage of more "local" independent signals. In the subject applications, the grandfathering argument has been abandoned for the proposed addition of four independents, no waiver is requested, and the systems are already carrying one independent. Under the circumstances, the applications must be denied.

In view of the foregoing, the Commission finds that the requested grant of certificates of compliance would be inconsistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance (CAC–786, CAC–787 and CAC–788) filed by Community Tele-Communications, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-718

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SUBPART B OF PART 64 OF THE COMMISSION'S RULES AND REGULATIONS GOVERNING DOMESTIC TELEGRAPH SPEED OF SERVICE STUDIES	Docket No. 19777

NOTICE OF PROPOSED RULEMAKING

(Adopted July 3, 1973; Released July 9, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT.

1. Notice is hereby given of proposed rule making looking to revision of the sections of Subpart B of Part 64 of the Commission's Rules and Regulations governing the conduct and reporting of domestic telegraph speed of service studies. The proposed amended rules as set forth in Appendix A will replace the present text of Sections 64.201 through 64.295.

2. The revisions appear desirable because of changes in operating methods and service objectives of The Western Union Telegraph Company. The company has recently replaced its multiple reperforator switching centers with a single computer switching complex, many company-operated offices have been converted to agency operation, telephone recording of messages has been consolidated into three centralized telephone bureaus, and former service performance goals have been superseded by delivery standards set forth in its tariffs.

3. The proposed new rules provide essentially that Western Union shall make service measurements on every 200th full rate message or money order transiting its switching computer from time of filing to time switched to the destination office or direct to telex or TWX subscribers over the 24-hour period daily. A monthly summary report will be produced to show the volumes handled, by time interval in 15 minute segments. Terminal handling speed of service (telephone, tieline and messenger deliveries) at local offices will be sampled one day each week using procedures now prescribed in the Rules, at the 25 largest telegraph centers. Service performance studies at agency offices are also prescribed, and the new rules provide for telephone speed of answer studies over the 24-hour period at the three centralized telephone bureaus.

4. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules and Regulations, interested persons may file comments on or before August 20, 1973 and reply comments on or before August 30, 1973. All submissions by parties to this proceeding or

persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. All relevant and timely comments and replies will be considered by the Commission before final action is taken in the proceeding. In reaching its decision on the proposed rules, the Commission may, in addition to the specific comments invited by this notice and any replies thereto, take into account other relevant information before it.

5. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C. (1919 M Street, N.W.).

7. Authority for the amendments herein proposed is contained in Section 4(i) of the Communications Act of 1934.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX A

Part 64, Subpart B, of Chapter I of Title 47 of the Code of Federal Regulations is revised to read as follows:

Subpart B—Domestic Telegraph Speed of Service Studies

DEFINITIONS

64.202 Filing Time.
64.203 Time delivered.
64.204 First attempt.
64.205 Tieline.
64.210 Identifying wire numbers.
64.212 Messenger route.
64.214 Time routed out.
64.215 Time returned.
64.216 Terminal handling speed of service.
64.218 Filing time to computer output speed of service.
64.220 Speed of answer—Central Telephone Bureaus (CTB).
64.221 Agency speed of service.

INSTRUCTIONS FOR THE CONDUCT OF TERMINAL HANDLING SPEED OF SERVICE STUDIES

General provisions

64.230 Offices and locations to be studied.
64.231 Types of messages to be tallied.
64.232 Exclusion of messages from tally.
64.233 Hours to be included and selection of study date.
64.234 Tallies; when made.
64.235 Suspension of tallying.
64.236 Volume of messages to be tallied.
64.237 Selection of offices for tallying.
64.238 Selection of messages for tallying.

Messages delivered by telephone

64.261 Selection and tally.

Messages delivered by tieline

64.271 Selection and tally.

Messages delivered by messenger

64.281 Route record data.
64.282 Selection and tally.

INSTRUCTIONS FOR THE CONDUCT OF FILING TIME TO COMPUTER OUTPUT SPEED OF SERVICE STUDIES

64.285 Procedures.

INSTRUCTIONS FOR THE CONDUCT OF CENTRAL TELEPHONE BUREAU SPEED OF ANSWER STUDIES

64.288 Procedures.

INSTRUCTIONS FOR THE CONDUCT OF AGENCY SPEED OF SERVICE STUDIES

64.290 Source of data.
64.291 Method of Tallying.

GENERAL PROVISIONS

64.297 Company instructions to offices making studies.
64.298 Summary reports.

Subpart B—Domestic Telegraph Speed of Service Studies

DEFINITIONS

64.202 Filing time.

The time a message is first accepted at an office for transmission, except as otherwise provided in this section.

(a) In the case of messages filed or corrected over the telephone, the time the transaction with the sender is completed shall be the time filed.

(b) In the case of messages filed over manually terminated teleprinter, TWX or Telex tielines, the filing time shall be the acknowledgment or stamped received time, whichever is earlier. Where messages are filed over a telefax tieline, the filing time shall be the stamped received time placed on the message upon removal from the recorder. Where messages are filed over TWX, Telex or Info-Com directly with the ISCS computer, the filing time shall be the acceptance time placed on the message by the computer. In the case of manually terminated tieline, if the sender is called back to verify a questionable part of the message, the original filing time shall be used unless a correction is made by the sender, in which case a new filing time consisting of the time the correction is received shall be placed on the message.

(c) In the case of messages received in an office by messenger, the time the messenger returns to the office from the pickup run shall be the time filed.

(d) In the case of messages filed at the counter, the time the transaction with the sender is completed shall be the time filed.

64.203 Time delivered.

The time delivery of a telegram is completed to the addressee (or to a person authorized to receive the telegram for the addressee), except as otherwise provided in this section.

(a) For speed of service purposes the first attempt to deliver a telegram shall be considered to be the time of delivery.

(b) When delivery is made by telephone, the time delivered is the time reading of a telegram is completed, or the time the first attempt to deliver is made.

(c) When delivery is made by manual teleprinter tieline (or manually by Telex/TWX) or by tieline switching equipment, the time delivered is the time transmission of a telegram is completed, or the time of the first attempt to deliver.

(d) When delivery is made by telefax tieline, the time delivered or time of first attempt is two minutes later than the time a facsimile transmitter is connected to the customer's line for transmission of the message.

(e) When delivery is made by messenger, the time delivered or the time of the first attempt to deliver for each message on the route shall be the time routed out plus one-half of the interval from the time routed out to the time returned.

(f) In the case of Domestic Full Rate Money Orders, the time delivered shall be the time the money order is paid or the payee is notified.

64.204 First attempt.

(a) In the case of telephone delivery, the time the addressee's telephone is reported to be busy or not answered, or reported out of order, or the addressee or someone authorized to accept the message is not available to receive the message.

(b) In the case of tieline delivery, the time of first attempt is the time transmission is attempted but could not be made because the addressee did not answer or, having answered, requested later transmission. Two minutes later than such time is the time of first attempt for facsimile tieline messages.

(c) In the case of messenger delivery, messages returned to the office undelivered for any reason when first routed out are "first attempts." The time of the first attempt to deliver shall be the time routed out plus one-half of the interval from the time routed out to the time returned.

(d) In all such cases there shall be noted on the message and delivery sheet the "first attempt" time and the reason for non-delivery.

(e) If unsuccessful attempts to deliver by one method result in transfer to another method for delivery, the messages shall not be tallied in the second method, but shall be tallied as a first attempt in the original method in those cases when it is practicable to do so.

(f) Messages delayed in delivery due to special instructions of the sender or addressee shall be excluded from tally as provided in 64.232.

64.205 Tieline.

A direct circuit connecting a telegraph company's office with a customer's office by teleprinter, telefax, TWX, Telex or Info-Com for the purpose of accepting and/or delivering telegrams.

64.210 Identifying wire numbers.

A number assigned to messages sent over each channel each day at office of origin.

64.212 Messenger route.

A continuous trip of a messenger for the physical delivery or pickup of telegrams entered on a Route Call Record.

64.214 Time routed out.

The time a messenger is dispatched on route.

64.215 Time returned.

The time a messenger returns to the office after completing a route.

64.216 Terminal handling speed of service.

The elapsed time from the time transmission is started from the computer to the destination Western Union office until time delivered or first attempt. For purposes of this measurement, messages sent to agents shall be measured to the time transmission to the agent completed.

64.218 Filing time to computer output speed of service.

The elapsed time from filing time to the time transmission is started to the destination terminal (Western Union office, TWX station or Telex station).

64.220 Speed of answer—Central Telephone Bureaus (CTB).

The elapsed time on an incoming telephone call from the start of ringing at the CTB until the call is answered by a recording operator.

64.221 Agency Speed of Service.

The elapsed time in agency handling on:

(a) Originating messages—from filing time to time transmitted to control office.

(b) Terminating messages—from time transmission to the agent is completed to time routed out for messenger delivery or time telephoned or first attempt.

INSTRUCTIONS FOR THE CONDUCT OF TERMINAL HANDLING SPEED OF SERVICE STUDIES

General provisions

64.230 Offices and locations to be studied.

The Western Union Telegraph Company shall conduct weekly terminal handling studies, in accordance with the instructions contained herein, in the following cities and locations:

Atlanta, Ga.
Baltimore, Md.
Boston, Mass.
Chicago, Ill.
Cincinnati, Ohio
Cleveland, Ohio
Dallas, Tex.
Denver, Colo.
Detroit, Mich.
Houston, Tex.
Indianapolis, Ind.
Kansas City, Mo.
Los Angeles, Calif.
Miami, Fla.
Minneapolis, Minn.
New Orleans, La.
New York, N.Y.
(All Public Message Centers)
Philadelphia, Pa.
Portland, Ore.
San Francisco, Calif.
St. Louis, Mo.
Washington, D.C.
Central Tel. Bureaus
Moorestown, N.J.
Bridgeton, Mo.
Reno, Nev.
(Telephone days only)

64.231 Types of messages to be tallied.

Of the messages selected as hereinafter provided, the following shall be tallied by time intervals on speed of service tally sheets: Domestic Full Rate including Government and CAK, Domestic Full Rate Money Order, CND and Full Rate International (INTL). (For purposes of this instruction, "Domestic" shall include messages originating in Canada and Mexico as well as other "domestic" points outside the United States.

64.232 Exclusion of messages from tally.

Messages other than those specified in 64.231 shall not be tallied. These messages include among others: Service, Wire, Press, Personal Opinion Messages (POM), Overnight Telegrams, Deadhead, confirmation copies of messages previously delivered, messages delayed in delivery due to special instructions of the sender or addressee, and messages delayed due to closed hours of the addressee.

64.233 Hours to be included and selection of study date.

Speed of service studies shall be made on messages received at delivery office between the hours of 9 A.M. and 6 P.M. local time, on one designated day each week, except as provided in 64.235 and 64.282. The day to be designated each week, for each of the listed offices in 64.230, shall be selected at a central point, from a random number table, and the date so determined shall not be communicated to the office involved prior to 4 P.M. local time at that office on the designated date.

64.234 Tallies; when made.

Speed of service tallies shall be made after 7:00 P.M. of the day of transmission but not later than the day following transmission, except any tally thus scheduled to be made on a holiday or a Saturday may be postponed until the following business day.

64.235 Suspension of tallying.

(a) Speed of service tallies shall not be taken with respect to messages handled on the following holidays: New Year's, Washington's Birthday, Valentine's

Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas; and on the last business day preceding each of these holidays.

(b) In the event of a serious and unusual communication emergency such as that caused by flood, earthquake, strike by respondent's employees, or fire, tallying may be suspended at the offices affected by such emergency. In the event of suspension of tallies during an emergency, messages handled during the emergency need not be tallied.

64.236 Volume of messages to be tallied.

At each city studied (in New York City, each PMC), there shall be sampled for each method of delivery (telephone, tieline and messenger) not less than 50 messages in each delivery method (or all available messages).

64.237 Selection of offices for tallying.

(a) Sampling for terminal handling speed of service in each method shall be limited to those offices in each city which deliver an average of 50 or more messages daily by telephone, tieline or messenger; provided, however, that if none of the offices in a city deliver 50 or more messages daily in a particular method of delivery, then each such office shall be considered as delivering an average of 50 messages per day in that method and as qualifying under this section for tallying.

(b) The volume to be sampled at each office shall be determined as follows:

(1) Where there are no branch offices in a city, the entire sample of 50 messages (or all available messages) in each delivery method shall be taken at the main office.

(2) Where there are one or more delivery branches in a city, the sample of 50 messages in each delivery method shall be divided between the main office and any branches delivering by that method in the proportion that each office load bears to the total delivered load in that method.

(3) The sample of 50 messages in the tieline method shall be divided between teleprinter (including TWX and Telex) and telefax in the ratio of the respective total city loads in these methods.

64.238 Selection of messages for tallying.

(a) The selection of individual messages to be tallied from the delivered message file on any method at any office shall be determined from the identifying wire number, as follows:

(1) A set of ten cards shall be prepared, each card bearing one of the digits 0 to 9;

(2) The ten cards shall be thoroughly shuffled face down followed by a cut of the deck. The digit appearing on the top card after completion of the cut shall determine selection of the messages to be tallied. Messages in the files of the types named in 64.231, received at delivery office between 9 A.M. and 6 P.M., local time, on which the identifying wire number ends in the digit selected shall be withdrawn from tallying until the quota for the day has been obtained.

(b) Offices shall select individual messages from the files for each method in the following manner:

(1) Where delivered messages are filed alphabetically, a card for each letter of the alphabet shall be prepared. The set of cards shall be shuffled face down and the deck cut. The top card shall be drawn after completion of the cut. The file shall be searched beginning with the letter of the alphabet drawn for individual messages of the types named in 64.231 whose identifying wire number ends in the digit drawn. If, after complete search of the file for messages received at delivery office between 9 A.M. and 6 P.M., local time, the quota for tallying is not obtained, the succeeding alphabet card or cards shall be drawn and used in the order of their appearance in the pack from the top down.

(2) Where delivered messages are filed in sent number sequence or in delivered time order or route records are filed in route out or return time order, a set of 9 cards shall be prepared, each card bearing one of the hours 9 A.M. to 10 A.M. through 5 P.M. to 6 P.M. The set of cards shall be shuffled face down and the deck cut. The top card shall be drawn after completion of the cut. The file shall be

searched beginning with the hour drawn for individual messages whose identifying wire number ends in the digit drawn. If after complete search of the file for messages of the types named in 64.231 received at delivery office between 9 A.M. and 6 P.M., local time, the quota for tallying is not obtained, another digit shall be selected in accordance with 64.238(a)(2).

Messages delivered by telephone

64.261 Selection and tally.

(a) Offices and messages selected for tallying in any city shall be determined in accordance with 64.236 to 64.238.

(b) Each selected message of the type described in 64.231 which was received at delivery office between the hours of 9 A.M. and 6 P.M., local time, shall be tallied.

(c) The interval of time to be tallied for each message selected shall be from the computer output time to the time delivered or time of the first attempt.

Messages delivered by tieline

64.271 Selection and tally.

(a) For messages delivered by telefax and manual teleprinter, TWX or Telex, offices and messages for tallying in any city shall be determined in accordance with 64.236 to 64.238.

(b) For messages delivered by tieline switching equipment, the following method for selection of messages to be tallied shall be used:

(1) Each roll of monitor tape, on which are recorded copies of messages delivered by tieline switching equipment shall be designated with a separate number;

(2) A number card shall be prepared for each numbered roll of monitor tape. The entire set of cards, representing an equal number of monitor rolls, shall be thoroughly shuffled face down daily and the deck cut. The required number of cards shall be withdrawn from the top of the deck after completion of the cut to determine the monitor roll or rolls from which tallies will be made. These cards shall be withdrawn and used in the order of their appearance in the pack from the top down;

(3) A digit shall be selected, as outlined in 64.238(a);

(4) Each message of the types named in 64.231 in the selected monitor tape rolls received at delivery office between 9 A.M. and 6 P.M., local time, on which the identifying wire number ends in the digit selected shall be tallied, until the quota is obtained.

(c) The interval of time to be tallied for each message selected shall be from the computer output time to the time delivered or time of the first attempt.

Messages delivered by messenger

64.281 Route record data.

At all offices in the cities enumerated in 64.230 where tallies are required to be made, the following shall be entered on route records: (a) The identifying wire number of each message; (b) the computer output time for each message of the types named in 64.231 except for confirmation copies of messages previously delivered; (c) the time a messenger is dispatched on each route carrying messages; and (d) the time of return from the route.

64.282 Selection and tally.

(a) Offices and messages selected for tallying in any city shall be determined in accordance with 64.236 through 64.238.

(b) Each message of the type described in 64.231 which was received at delivery office between the hours of 9 A.M. and 6 P.M., local time, shall be tallied, except that messages delivered by telephone and subsequently dispatched for physical delivery by messenger need not be tallied.

(c) The interval of time to be tallied for each message selected shall be from the computer output time to the time delivered or to the time of the first attempt (see 64.203 and 64.204).

INSTRUCTIONS FOR THE CONDUCT OF FILING TIME TO COMPUTER OUTPUT SPEED OF SERVICE STUDIES

64.285 Procedures.

Continuous studies shall be made of the elapsed time from filing time to computer output time on full-rate and money order traffic transiting the computer. The monthly report of sampled traffic will be based upon every 200th full rate message or money order transiting the computer and will include messages which originate as Teleprinter Computer Service (TCS) inputs by Telex, TWX and Info-Com customers as well as those originating at Western Union offices.

INSTRUCTIONS FOR THE CONDUCT OF CENTRAL TELEPHONE BUREAU SPEED OF ANSWER STUDIES

64.288 Procedures.

Continuous studies will be made of the speed of answer at the three Central Telephone Bureaus, Moorestown, New Jersey, Bridgeton, Missouri and Reno, Nevada. Monthly reports shall be made for each of the bureaus showing the percentage of calls answered within 20 seconds and also the percentage of calls answered within 50 seconds.

INSTRUCTIONS FOR THE CONDUCT OF AGENCY SPEED OF SERVICE STUDIES

64.290 Source of data.

Agency speed of service studies shall be prepared from summary data contained in Western Union's Agency Inspection Guide List, Form WU 16, for Class 9–C and Class 11–B agencies, which forms shall be collected and maintained at the Company's Washington, D.C. headquarters.

64.291 Method of tallying.

(a) As inspection forms are received during the month to be studied, such forms shall be sorted and filed in:

(1) chronological order, and

(2) administrative area order.

(b) At the close of the study month the forms shall be held in a separate file from those received in the ensuing month for speed of service sampling.

(c) The forms for each administrative area shall be studied on a random sampling basis as follows:

(1) The number of forms for each area under study shall be determined;

(2) Based upon the number of forms received for each area, the number of forms to be sampled shall be determined from the following incremental sampling table:

Number of forms in given area (population)	Sample size	Sample selection
20 or less	All items	All items.
21 to 25	17	Random number table.
26 to 30	19	Do.
31 to 35	23	Do.
36 to 40	25	Do.
41 to 45	27	Do.
46 to 50	30	Do.
51 to 60	33	Do.
61 to 75	37	Approximately 1 of 2, random start.
76 to 100	42	Do.
101 to 150	49	Approximately every 3d item, random start.
151 to 200	54	Approximately every 4th item, random start.
201 to 250	57	Approximately every 5th item, random start.
251 to 300	59	Approximately every 6th item, random start.
301 to 500	64	Approximately every 9th item, random start.
501 to 750	67	Approximately every 10th item, random start.
751 to 1000	69	Approximately every 15th item, random start.

(3) The sampling process will begin and proceed based upon selection from a random number table.

(4) The speed of service data from each inspection form selected shall be tallied on the prescribed form, using a separate form or series of forms for each administrative area.

(d) Each form shall be summarized in the lower portion of the prescribed form, utilizing the last page of a series for the purpose.

(e) The study and summary forms shall be submitted to the Commission in "work paper" form upon completion of the studies for all administrative areas.

GENERAL PROVISIONS

64. 297 Company instructions to offices making studies.

Two copies of all general instructions (and of any amendments thereto) issued to field offices for the purpose of complying with 1.804 of this chapter and 64.201 to 64.298 shall be filed with the commission upon issuance.

64.298 Summary reports

The following reports shall be submitted monthly in quadruplicate, on designated forms, no later than the 25th of the month following the month under report:

(a) The results of the studies of terminal handling speed of service at the cities and installations indicated in 64.230.

(b) The results of the computer analysis of filing time to computer output speed of service as described in 64.285.

(c) The results of speed of answer studies at the three Central Telephone Bureaus, as described in 64.288.

(d) The results of agency speed of service studies as described in 64.291.

Monthly Summary of Terminal Handling Speed of Service
(Computer Output Time to Time Delivered).

The Western Union Telegraph Company

_____
Month

Location	Telephone Deliveries		Tieline Deliveries		Messenger Deliveries	
	Number Messages	Average Speed (Mins)	Number Messages	Average Speed (Mins)	Number Messages	Average Speed (Mins)
Central Telephone Burs						
Bridgeton						
Moorestown						
Reno						
Atlanta						
Baltimore						
Boston						
Chicago						
Cincinnati						
Cleveland						
Dallas						
Denver						
Detroit						
Houston						
Indianapolis						
Kansas City						
Los Angeles						
Miami						
Minneapolis						
New Orleans						
New York						
PMC 1						
PMC 2						
PMC 3						
PMC 4						
PMC 5						
PMC 6						
PMC 7						
Philadelphia						
Portland						
San Francisco						
St. Louis						
Washington, DC						

104-002—73——4

Monthly Speed of Service Summary
(Filing Time to Computer Output Time)

The Western Union Telegraph Company

_____
Month

Time in Minutes	Number of Full Rate Messages Sampled	Cumulative Percent Switched
00-15		
15-30		
30-45		
45-60		
60-75		
75-90		
90-105		
105-120		
120-135		
135+		

Monthly Summary of Telephone Speed of Answer
(Central Telephone Bureaus)

The Western Union Telegraph Company

_____
Month

Days of Week	Bridgeton, Mo.			Moorestown, N. J.			Reno, Nev.		
		Pct. Ans.			Pct. Ans.			Pct. Ans.	
	Volume	20 Sec.	50 Sec.	Volume	20 Sec.	50 Sec.	Volume	20 Sec.	50 Sec.
Sundays									
Mondays									
Tuesdays									
Wednesdays									
Thursdays									
Fridays									
Saturdays									

Monthly Summary of Agency Speed of Service

The Western Union Telegraph Company

Area_____ Month_____

City	DELIVERY * Number of Messages		ORIGINATING ** Number of Messages	
	Tallied	Within 60 Minutes	Tallied	Within 30 Minutes
Total				

* Elapsed time from time received to time dispatched or telephoned
** Elapsed time from time filed to time of transmission

SUMMARY

DELIVERY

Total Agencies sampled _____
Total messages tallied _____
Total messages within 60 mins. _____
Performance percentage _____

ORIGINATING

Total agencies sampled _____
Total messages tallied _____
Total messages within 30 mins. _____
Performance percentage _____

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
THE EVENING STAR–THE SUNDAY STAR, WASHINGTON, D.C.
For Access to Correspondence Concerning A.T. & T.

JULY 6, 1973.

Mr. STEPHEN M. AUG,
The Evening Star–The Sunday Star,
Washington, D.C.

DEAR MR. AUG: This is to advise you that I am granting your request of July 3, 1973 for access to an exchange of correspondence involving an extension of time given to the accounting firm of Touche Ross & Co. to complete work for the Commission concerning the investigation of American Telephone & Telegraph Company.

As you know, the letters involved are not Commission records that are routinely available for public inspection under the Commission's rules. However, in accordance with Section 0.461(a) of the rules, 47 CFR § 0.461(a), I have determined that there is no need for withholding these records from public inspection.

Arrangements may be made through my office for inspection of the Commission's file in this matter.

Sincerely yours,

JOHN M. TORBET, *Executive Director.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JOSEPH MAURO, SILVER SPRING, MD.
Concerning Fairness Doctrine Re Station
WTOP–TV, Washington, D.C.

JULY 13, 1973.

Mr. JOSEPH MAURO,
1828 Brisbane Court,
Silver Spring, Md.

DEAR MR. MAURO: This is in response to your letter of complaint, dated June 21, 1973, alleging that Station WTOP–TV, Washington, D.C., has failed to comply with the fairness doctrine with respect to the subject of abortion.

In particular, you state that on Sunday, March 11, 1973, WTOP–TV broadcast a half-hour edition of its program "Everywoman" which consisted of a panel discussion of the abortion issue; that the program began with an opening statement by the moderator, Rene Carpenter, followed by two-minute statements of position from each of the four persons composing the panel—"two persons for and two against abortion"; that these opening statements were followed by two ten-minute segments during which the audience asked questions of the panelists; and that the broadcast concluded with a closing statement by the moderator. You also state that "the opening and closing statements of the station's moderator-employer were decidedly anti-life or pro-abortion, as were her comments during the other portions of the program," and that "while the format of the show was otherwise conducive to a balanced presentation of contrasting views, the biased editorializing by the moderator dominated the presentation and robbed it of any 'fairness.'" You submit that "the station's presentation of her [the moderator's] extremely slanted viewpoint precludes the station from claiming now that it made either a reasonable or good faith attempt to present contrasting views fairly." Copies of correspondence which you have submitted indicate that you brought these claims to the station's attention by letter dated February 22, 1973 and that by letter dated March 8 the station replied that in its judgment "the 'Everywoman' show you appeared on was a balanced and fair examination of the differing views about abortion." You request a determination "that WTOP–TV's programming on the abortion issue violated the fairness doctrine" and "such relief as is appropriate."

As explained in previous correspondence, where complaint is made to the Commission under the fairness doctrine, the Commission expects a complainant to submit specific information indicating, *inter alia*, reasonable grounds for the claim that the station broadcast only one

side of a controversial issue of public importance and has failed to afford reasonable opportunity for the presentation of contrasting views in its *overall* programming. *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969). Review of your instant complaint fails to disclose any allegation or other information tending to show that the licensee has not afforded such reasonable opportunity in its *overall* programming on the issue of abortion, as opposed to the one particular program which you have cited.

Furthermore, with respect to the particular program about which you have complained, it should be noted that neither the fairness doctrine nor any other rule or policy of the Commission precludes the presentation of viewpoints on controversial issues of public importance by licensees or their employees, and that the expression of such viewpoints alone does not evidence that a licensee has acted unreasonably or in bad faith in meeting his fairness doctrine obligations. Also, the fairness doctrine does not require that precisely equal time be afforded to each side of a given issue or that a perfect balance of sides and viewpoints be achieved. As the Commission has stated: "A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open.'" *National Broadcasting Co., Inc.* (AOPA Complaint), 25 FCC 2d 735, 737 (1970). All the fairness doctrine requires is that a "reasonable opportunity" be afforded for the presentation of contrasting views on controversial issues of public importance discussed in the station's programming. You have indicated that the "Everywoman" program in question afforded you and another anti-abortion spokesman, as well as the two pro-abortion spokesmen, two minutes each to present and discuss your positions on the issue and also provided two ten minute segments for response to related audience questions.

For the foregoing reasons, it does not appear that Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

F.C.C. 73-651

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FOUR STAR BROADCASTERS, INC., KEYSER, W. VA. Requests: 94.1 MHz, #231; 6 kW (H & V): 785 feet For Construction Permit	File No. BPH-8006

ORDER

(Adopted June 13, 1973; Released June 20, 1973)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING IN THE RESULT. COMMISSIONER JOHNSON DISSENTING. COMMISSIONER H. REX ABSENT.

1. The Commission has before it (a) the above application; (b) a petition to deny filed by Western Maryland Broadcasting Co., Inc. (hereinafter referred to as WFRB or petitioner), licensee of stations WFRB(AM) and WFRB-FM, Frostburg, Maryland, and (c) pleadings in opposition and reply.

2. The petitioner claims that Four Star Broadcasters, Inc. (Four Star), will provide a primary signal over Frostburg with the proposed facility. Since the proposed station would compete for audiences and advertising revenues with stations WFRB(AM) and WFRB-FM, we find that the petitioner has standing as a party in interest within the meaning of section 309(d) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 RR 2008 (1940).

3. WFRB alleges that the grant of Four Star's FM application would cause a regional concentration of control of broadcasting which is inconsistent with the public interest, convenience and necessity, because six aural broadcast facilities located in a limited area of West Virginia and Maryland would be owned by the same parties. As noted by the petitioner, the three stockholders of Four Star also own Potomac Broadcasting Co., Inc., licensee of station WKLP(AM), Keyser, West Virginia. These three stockholders, Thomas B. Butscher, Kenneth E. Robertson, and Gary L. Daniels, also collectively own in excess of 66 percent of Berkeley Springs Radio Station Corp., licensee of stations WCST(AM) and WCST-FM, Berkeley Springs, West Virginia, and more than 77 percent of Oakland Radio Station Corp., licensee of stations WMSG(AM) and WMSG-FM, Oakland, Maryland. The petitioner contends that the three communities in which the five stations owned by the principals of Four Star are located fall

roughly in a straight line running southwest to northeast over a distance of about 65 miles from Oakland, Maryland, to Berkeley Springs, West Virginia, the latter community being located in West Virginia's eastern panhandle. WFRB also points out that stations WMSG(AM) and WMSG–FM are the only broadcast stations assigned to Oakland, Maryland, and Garrett County, Maryland; that station WKLP is the only broadcast station assigned to Keyser, West Virginia, and Mineral County, West Virginia; that stations WCST(AM) and WCST–FM are the only broadcast stations assigned to Berkeley Springs, West Virginia, and Morgan County, West Virginia; and that the 0.5 mV/m contour of station WKLP overlaps with the 0.5 mV/m contours of stations WCST and WMSG. The petitioner further states that the separation between the primary signal area of Four Star's proposed FM station and that of station WMSG–FM is not significant, that Four Star's proposed 1.0 mV/m contour is tangent with the 1.0 mV/m contour of station WCST–FM, and that Four Star has proposed to utilize less than the maximum facilities permitted under the rules for a class B operation. These two latter considerations are directed at the issue of whether Four Star proposes an efficient utilization of the FM frequency allocated to Keyser as well as the concentration of control issue. Lastly, the petitioner alleges that the common supervision and management of the five existing stations referred to above will be furthered by the proposed FM station in Keyser and will increase the "program dominance" and economic dominance of stations owned by Four Star's principals. To support these allegations, WFRB outlines the similar percentages of certain types of programming broadcast on the existing stations and notes that station WKLP in Keyser has notified the Commission that it will occasionally rebroadcast programs from its sister stations in Oakland, Maryland, and Berkeley Springs, West Virginia. In this respect, we observe that Four Star plans to duplicate the programming of station WKLP during the daylight hours. As to the allegation of economic dominance, WFRB asserts that the existing stations owned by Four Star's principals offer joint rates to advertisers, thus placing them at a considerable economic advantage in their markets. WFRB has submitted a rate card to verify the availability of these joint rates and cites *Brown Broadcasting, Inc.*, 3 FCC 2d 887, 8 RR 2d 55 (Rev. Bd., 1966) for the principle that the presence of joint rates is sufficient in itself to raise a hearing issue as to whether an undue concentration of control of broadcasting exists.

4. In response to the allegation concerning economic dominance, Four Star has filed an affidavit from its secretary-treasurer, Gary L. Daniels, in which he states that the practice of offering joint or combined rates in connection with the operation of the stations in Oakland, Keyser, and Berkeley Springs, was discontinued on July 1, 1972, and that Four Star does not propose use of combined rates in connection with the Keyser FM facility. Four Star concludes, therefore, that the Review Board's decision in *Brown, supra*, does not apply to Four Star's situation. We agree. Moreover, Four Star asserts that the proposed FM station in Keyser will provide a first local nighttime broadcast service to Keyser and that a grant of its application would therefore be in the

public interest. In support of its argument that a grant of its FM proposal would not result in an undue concentration of control, Four Star states that we delineated the criteria for determining the existence of concentration of control over media of mass communications in *Lee Enterprises, Inc.*, 18 FCC 2d 684, 16 RR 2d 904 (1969). These criteria include, *inter alia*:

> . . . the relevant market or area (local, regional and/or national), numbers and types of competing media, and population served and degree of control of particular media in the applicant's hands.

Four Star correctly indicates our concern with whether a particular applicant has the potential to dominate the discussion of issues of public importance in a given community. Four Star believes that when this standard is applied to the community of Keyser and to Four Star, it is apparent that no concentration of control will occur. Specifically, Four Star observes that the communities of Keyser, Berkeley Springs and Oakland are small,[1] separate and distinct communities which are relatively isolated from each other due to mountainous terrain. Four Star claims that WFRB's reliance upon the air distances between these communities does not give proper consideration to the mountainous terrain which effectively isolates these communities to a greater degree than mere air distances would imply, and places each community in its own "pocket" between mountains. In regard to service provided to the three communities involved. Four Star notes that each of its stations has its own news department which writes, edits and broadcasts its own local news, while rebroadcasting regional news and sports. This practice allows the different stations to upgrade their news coverage without detracting from the autonomy of each station's news department in the area of local reporting. In response to the allegation of "program dominance" which the petitioner contends results from the similar music formats of stations in the three communities involved, Four Star states that since the stations are the only local broadcast outlets, each station has been programmed to serve the widest possible range of opinions and tastes in each community. The fact that the musical tastes of the people in these communities is similar is not surprising and we note that each station broadcasts at least four different types of music programming. Even more significant in regard to the allegation of "program dominance" is the fact that there are a large number of other media available in Keyser, Berkeley Springs, and Oakland.

5. Four Star has made an extensive showing of the other media which are available to the residents of the communities of Keyser, Berkeley Springs and Oakland. Cable television systems serve each community, supplying at least nine television signals and 25 FM signals to the residents of Keyser; six commercial television signals and 20 FM signals to the residents of Oakland, Maryland; and nine television signals to the residents of Berkeley Springs, West Virginia. In addition, each community has its own newspaper. Two newspapers are published in Keyser, a daily with a circulation of 5,829 and a weekly with a circula-

[1] The 1970 populations of Keyser and Berkeley Springs, West Virginia, and Oakland, Maryland, are 6,586, 1,138, and 1,786, respectively.

tion of 1,151. A weekly newspaper with a circulation of 8,460 is published in Oakland, while a weekly newspaper having a circulation of 3,800 is published in Berkeley Springs. Further, newspapers published in Cumberland, Maryland, have subscribers in the counties in which the three communities are situated. Moreover, Four Star has filed an engineering study which indicates that a considerable number of broadcast signals from stations in which Four Star's principals have no interest are available "off the air" in the three communities.[2] We also note that the principals of Four Star have no ownership interests in the CATV systems and newspapers which provide the other means of mass communications in the three communities. In light of the distinct and isolated character of the three communities involved, the essentially separate programming provided to each community by its existing radio stations, and the existence of several other forms of mass media in the areas involved, we find that no material and substantial question of fact is raised with respect to whether the grant of Four Star's FM application would result in an undue regional concentration of control. Thus, no hearing issue in this regard is warranted.

6. Four Star proposes to operate the class B FM facility allocated to Keyser with an effective radiated power of 6 kW and an antenna height above average terrain (HAAT) of 785 feet. Operating in this manner, there would be no overlap between the 1 mV/m contours of the Keyser station and that of commonly owned station WCST–FM, Berkeley Springs, West Virginia, which is a class A facility operating with an effective radiated power of 3 kW and antenna HAAT of 70 feet. However, if the proposed station were to utilize the maximum permissible power of 17 kW along with an antenna height of 785 feet, or if WCST–FM were to operate with maximum class A facilities, such overlap would occur, in violation of the duopoly provision of our multiple-ownership rules [section 73.240(a)(1)]. In response to a staff inquiry concerning the efficient utilization of the class B frequency involved, Four Star asserts that its proposal would result in an efficient utilization of this frequency since it will provide a first local nighttime broadcast service to Keyser, a 1 mV/m FM service to 132,860 persons in an area of 2,348 square miles, service to an FM unserved area of over 170 square miles and a population of more than 2,000 people, and a second or "gray area" FM service to an area of over 225 square miles encompassing more than 4,500 people.

7. In addition, Four Star relates the history of its attempts to establish the first FM station and the first local nighttime broadcast service in Keyser. It claims that nobody applied for channel 240A, which

[2]

Other services	WMSG (AM and FM) Oakland, Md.		WKLP (AM and FM) Keyser, W. Va.		WCST (AM and FM) Berkeley Springs, W. Va.	
	Min.	Max.	Min.	Max.	Min.	Max.
0.5 mV/m (AM)	2	16	2	12	1	9
1.0 mV/m (FM)	0	2	0	5	1	8
Grade B (TV)	1	10	0	5	0	2

was allocated to Keyser in 1963, until March 1970, when Four Star filed an application for that channel. Since Four Star did not meet our spacing requirements with respect to an existing station, it requested a waiver of section 73.207 of our rules. The waiver was denied, but we gave Four Star 30 days to locate a new transmitter site which would meet our spacing requirements. Four Star was evidently unable to discover such a site, and its application for channel 240A was dismissed on December 4, 1970. On June 26, 1971, Four Star filed a Petition for Rule Making in which it asked us to assign channel 231, an allocation requiring class B facilities, to Keyser. The petition was unopposed. We found that channel 240A should be deleted from Keyser since "it did not lend itself to being utilized for effective public service" and we assigned channel 231 to Keyser on June 21, 1972. In our *Report and Order in Docket No. 19401, RM–1756*, we stated the following:

> Keyser is in genuine need of this assignment, comparatively and absolutely, and making it clearly would further the public interest. Therefore, we will make the requested assignment, and we expect Four Star to promptly proceed to apply for its use, proposing facilities capable of fulfilling its potential for area-wide service.

We note that Four Star applied for the very facilities which it used as examples in the rule-making proceeding for predicting areas and populations which could be served by a class B facility licensed to serve Keyser. Furthermore, Four Star has submitted an engineering statement which indicates that if its proposed FM facility at Keyser were to utilize maximum facilities, it would serve 163,950 persons over an area of 3,505 square miles, which represents an increase over its current proposal of only 31,090 persons located over an area of 1,157 square miles, which is about 26.9 persons per square mile. Similarly, if station WCST–FM, Berkeley Springs, were to use maximum facilities, it would be serving a gain area in which the population per square mile would be about 26.3 persons. In short, if both stations were to use maximum facilities, their gain areas would consist of rural areas with relatively sparse populations. Moreover, Four Star's engineering statement indicates that high mountains in the range from five to seven miles from station WCST–FM's transmitter site would effectively limit the 1 mV/m contour at these distances regardless of the antenna height used. Thus, the effective radiated power and antenna HAAT of station WCST–FM and of Four Star's proposed FM station at Keyser appear to be realistic and appropriate for the service areas involved and the need of the people in the general area surrounding Keyser for a first nighttime service.

8. Therefore, in view of the peculiar geography of the area to be served, the sparse population of the areas beyond Four Star's proposed 1 mV/m contour which might be served if Four Star were to use maximum facilities, and the fact that Four Star proposes to construct the first FM facility in Keyser, West Virginia, which would provide the first local nighttime service to Keyser and its environs, we find that Four Star's engineering proposal constitutes an efficient utilization of the frequency allocated to Keyser.

9. In light of the foregoing, we find that the petition to deny filed by Western Maryland Broadcasting Co., Inc., licensee of stations WFRB(AM) and WFRB–FM, Frostburg, Maryland, has failed to raise any substantial and material questions of fact in regard to the application of Four Star Broadcasters, Inc., which warrant a hearing. Furthermore, we have examined the proposal and find that Four Star Broadcasters, Inc., is fully qualified to construct and operate its proposed station, and that a grant of its application would serve the public interest, convenience, and necessity.

10. Accordingly, IT IS ORDERED, That the above petition filed by Western Maryland Broadcasting Co., Inc., licensee of stations WFRB(AM) and WFRB–FM, Frostburg, Maryland, IS DENIED, and that the application of Four Star Broadcasters, Inc. (BPH–8006), IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-628

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of GENERAL ELECTRIC Co. For Authorization To Construct and Operate Developmental Earth Stations at Valley Forge, Pa. and Pleasanton, Calif.	File Nos. 11-DSE-P-73, 12-DSE-P-73

ORDER AND AUTHORIZATION

(Adopted June 13, 1973; Released June 14, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it applications filed on March 6, 1973 by General Electric Radio Services Corporation, an affiliate of General Electric Company (GE), for authority to construct and operate two domestic communications satellite earth stations for developmental purposes and as a part of GE's present leased terrestrial communications network. The applications, which were placed on public notice on April 2, 1973, are unopposed and there are no unresolved frequency conflicts assuming that GE builds a 30 foot high diffraction fence at the Valley Forge station as an interference shield and realizes a value of loss used in their interference calculations.

2. At the present time, GE leases a private nationwide communications system—called DIALCOMM—to meet its extensive internal communications requirements. The system comprises a series of 16 switching centers, which serve as the collection and routing centers for many individual communication trunk lines located within their respective geographic areas. Trunk lines serve to connect the switching centers. In this application, GE proposes to construct and operate two transmit/receive satellite earth stations—one at Valley Forge, Pennsylvania and one at Pleasanton, California—interconnected by leased satellite communications channels which will serve as transcontinental point-to-point trunks. The stations will eventually be made an integral part of the present DIALCOMM system, and during pilot operations will perform some of the functions now requiring terrestrial transmission lines. The stations will be used to ascertain the ultimate operational feasibility of replacing GE's present DIALCOMM system with a series of geographically dispersed earth station/ground distribution facilities. The stations will also be used to develop, test, evaluate and, if appropriate, implement new and innovative applications of communications satellite technology.

3. According to GE, for over ten years, it has continuously examined the feasibility and desirability of establishing its own communications facilities as a means of reducing its communicatons costs. In 1972 the cost of GE's nationwide network exceeded $31 million, exclusive of costs for local services. Moreover, absent some effective alternative, these communications expenses are presently expected to reach some $45 million by 1975 and to approximate $80 million by the end of the decade. Present projections indicate that, if implemented, a fully-deployed satellite system might reduce the annual cost of GE's interfacility communications services by as much as 50%, if projected AT&T rate increases take place and no other alternatives appear.

4. GE estimates that the cost of the radio equipment for the two pilot earth stations is $510,000. In addition, with related central control and monitoring equipment, and trunk access units, the total GE investment will approximate $2 million. GE has already devoted more than $2.2 million to the development and preliminary testing of the system concept, and has specifically committed an additional $1.7 million to the two station pilot. Any additional corporate funding necessary for effectuation of the two station proposal is anticipated upon receipt of the necessary Commission authorization.

5. The two stations will utilize satellite channel space leased from satellite space segment carriers. Thirty-three duplex voice channels (60 KHz) will be required in the satellite. It is proposed that the stations will initially employ transponder channels on the Telesat Canada system. Based on its discussions with Telesat Canada, American Satellite Corporation and others, GE anticipates that the necessary transponder channels will be made available to it. However, if no United States space segment carrier has yet been authorized to furnish such service by means of Telesat satellites when GE's construction has progressed to the point where plans for radiation must be finalized, GE will undertake to negotiate directly with Telesat Canada for transponder space. In either event, GE intends to transfer its satellite channel requirements to a United States space segment carrier when domestic satellite systems become operational. The pilot operations would continue as a minimum through December 1974.

6. The domestic satellite policies adopted in the *Second Report and Order* in Docket No. 16495 contemplate a "flexible ground environment which would permit a variety of earth station ownership patterns and afford diversified access to space segments except where this is impracticable" (35 FCC 2d 844, 855–856). It appears that the instant applications are consistent with that policy, as well as with our policy of permitting temporary use of the Telesat Canada space segment by qualified applicants under the terms and conditions of the inter-governmental Understanding with Canada. *Memorandum Opinion and Order on the application of American Satellite Corporation*, adopted April 18, 1973 (FCC 73–427). GE has indicated its willingness to comply with the requirement there imposed that an end user utilizing the Telesat space segment must transfer to a United States space segment upon the availability of such common carrier facilities, in the absence of a showing of good cause. Moreover, in order

to ensure that any arrangement for end user utilization of the Telesat space segment is temporary, we will limit the license term for the facilities constructed by GE to a period of one year, subject to an application for renewal. In considering any request for renewal, we will take into account the status of United States domestic space segment facilities.

7. Upon review of the instant applications, including the environmental statement submitted by GE on May 22, 1973, we find that a grant of the applications would serve the public interest and that GE is legally, technically and financially qualified to construct and operate the proposed earth stations.

8. Accordingly, IT IS ORDERED, that the above-captioned applications ARE GRANTED to the extent reflected herein and General Electric Radio Services Corporation IS AUTHORIZED to construct transmit-receive earth stations at Valley Forge, Pennsylvania and Pleasanton, California for developmental purposes as specified in such applications, and to seek to obtain satellite capacity sufficient to meet the instant developmental requirements either from Telesat Canada directly or through a United States communications common carrier authorized to provide service by means of Telesat satellites, subject to the following terms and conditions:

(a) The license for operation of the facilities authorized herein shall be for a period of one year, subject to an application for renewal of license;

(b) The satellite channel requirements shall be transferred to a United States domestic space segment carrier when such facilities become operational in the absence of a showing of good cause;

(c) The construction and operation of the earth stations shall be in accordance with the following technical specifications:

3 kW, 6 GHz transmitter;
8 meter parabolic antenna;
83 dBW EIRP in the mainbeam, maximum;
6.7 dBW/4 kHz EIRP in the horizontal plane at 14° minimum elevation angle;
one 36 MHz transmit channel @ 6 GHz;
141° K receiving system noise temperature;

and as otherwise described in the applications and in the construction permits;

(d) General Electric Radio Services Corporation shall install the diffraction fence described in the construction permit for the Valley Forge earth station; and

(e) General Electric Radio Services Corporation shall file with the Commission a detailed report on the results of the developmental operations within 60 days of the expiration of the license or together with any application for renewal of license.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-679

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
HALIFAX CABLE TV, INC., DAYTONA BEACH,	CAC-554 FL057
FLA., SOUTH DAYTONA, FLA., PORT ORANGE,	CAC-555 FL061
FLA., DAYTONA BEACH SHORES, FLA., PONCE	CAC-556 FL060
INLET, FLA., THE PORTIONS OF VOLUSIA	CAC-557 FL065
COUNTY, FLA. WITHIN THE ORLANDO-DAY-	CAC-558 FL219
TONA BEACH TELEVISION MARKET	CAC-559 FL220
For Certificate of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released July 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSENT.

1. Halifax Cable TV, Inc. operates cable television systems at Daytona Beach, South Daytona, Port Orange, Daytona Beach Shores, Ponce Inlet, and portions of Volusia County, Florida, each within the Orlando-Daytona Beach major television market (#55). Each system was in operation prior to March 31, 1972, and is authorized to carry the following Florida television broadcast signals:[1]

WJCT, Channel 7, Educ., Jacksonville.
WFTV, Channel 9, ABC, Orlando.
WDBO-TV, Channel 6, CBS, Orlando.
WESH-TV, Channel 2, NBC, Daytona Beach.
WMFE-TV, Channel 24, Educ., Orlando.
WEDU, Channel 3, Educ., Tampa.

In addition, the systems at Daytona Beach Shores, Ponce Inlet, and Volusia County carry:

WTLV, Channel 12, NBC, Jacksonville.
WJXT, Channel 4, CBS, Jacksonville.

On June 9, 1972, Halifax filed an "Application for Certificate of Compliance" to add the following television signals to each system:

WTOG, Channel 44, Ind., St. Petersburg.
WCIX-TV, Channel 6, Ind., Miami.
WSWB-TV, Channel 35, CP, Orlando.

[1] Halifax is not seeking certification for Stations WJCT and WEDU. WEDU is not presently being carried due to poor off-the-air signal quality and neither WEDU nor WJCT is required to be carried on these systems.

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Oppositions to the application were filed by Sun World Broadcasters, Inc., permittee of WSWB–TV, and by Cowles Florida Broadcasting, Inc., licensee of WESH–TV. Halifax replied, and amended its application.

2. Pursuant to Section 76.63 of the Commission's rules, cable systems in the second fifty major markets may carry, *inter alia*, two independent stations and any stations licensed to other designated communities of the same major market. Thus, the addition of independent Stations WTOG and WCIX–TV and Station WSWB–TV, a market signal, are in compliance with our rules. Cowles objects to the continued carriage of the two distant network stations, WTLV (NBC) and WJXT (CBS), Jacksonville, on the Daytona Beach Shores, Ponce Inlet, and Volusia County systems, because neither signal is significantly viewed in the county of the systems and neither is the nearest available network station. However, Halifax was authorized to carry both stations on each of its six systems prior to March 31, 1972, and is permitted to continue their carriage as "grandfathered" signals, pursuant to Section 76.65 of our rules. The objection is therefore without merit.

3. Sun World argues that the importation of two independent signals will adversely affect the economic viability of WSWB–TV, and that Halifax has failed to guarantee that it will comply with all applicable Commission rules. Since WSWB–TV's economic argument is unsubstantiated, it must be rejected. Further, we do not require a "guarantee" from applicants that they will fully comply with all of our rules. We expect that all applicants will comply with our rules and, in fact, Halifax has submitted a statement of its intent to do so.

4. Section 76.251(c) of the Rules requires an existing cable system to add one access channel for each broadcast signal which it adds pursuant to Section 76.63(a) (as it relates to Section 76.61(b) or (c)). Thus, Halifax is required to provide two access channels for each of its six systems. In its objection Cowles asserts, presumably on the assumption that the addition of market signals also requires the addition of access channels, that Halifax must provide three access channels for each system since three broadcast signals are being added. This objection is without merit because only WTOG and WCIX–TV are being added pursuant to either Sections 76.61(b) or (c), or Section 76.63(a) of the Rules.

5. Halifax originally proposed to provide access space only on those channels which were being used to carry distant network signals, but which would be available while network program exclusivity was being providing to higher priority signals. Sun World objected to the proposal for "shared" access channels and further asserted that Halifax had failed to describe its proposed access and local origination services adequately. By amendment, Halifax substantially revised its original access plans and asks for temporary relief from strict compliance with Section 76.251 of the Rules. Recognizing that it would be required to furnish a total of twelve access channels, Halifax states that it is presently incapable of providing, and in fact there is no community need for, such extensive service. Instead, Halifax proposes to provide two full-time access channels (one designated for public

use and one designated for educational use) to be shared by the six systems. Halifax states that this arrangement will not diminish either the opportunities for, or the use of, access in the several communities. The six communities are geographically contiguous, are served by one consolidated school system, and are operated from a common headend.[2] The sharing of access channels under these circumstances was specifically envisioned in the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 359 (1972), and we have in the past permitted the practice upon proper showing. *See*, e.g. *Garity Broadcasting Company*, 36 FCC 2d 69 (1972), and *Coldwater Cablevision, Inc.*, 40 FCC 2d 58 (1973). In addition, Halifax states that it will reserve two full channels for future access needs on its systems at Daytona Beach, South Daytona, and Port Orange. On its Daytona Beach Shores, Ponce Inlet, and Volusia County systems, two channels now being used for carriage of broadcast signals will be reserved for access purposes at times when network program exclusivity is being provided. The channel reserved for WSWB–TV will also be available for access use until that station begins operations, and one channel will continue to be used for local originations. Furthermore, Halifax has given its assurance that it will provide full access service to the six communities by 1977.

6. We find that the amended application contains an adequate short-term proposal for non-broadcast activities on the Halifax systems, and that a grant of the requested temporary waiver is appropriate. We emphasize that while we will permit the proposed type of "shared" access where it will provide service beyond that required by our rules, Halifax's proposal also includes the use of specially designated channels, which is the touchstone of the access cablecasting rules, and it is this use that makes its short-term access plans acceptable. Since major market systems that commenced operations before March 31, 1972 are not required to comply with our "channel expansion" rules until 1977, to deny access service over and above what is required, even if presented on broadcast channels, would serve no useful public purpose. To the extent that three of the Halifax systems do present extra access services during exclusivity blackout time, however, they will be required, consistent with our philosophy expressed in *Coldwater Cablevision, Inc.*, *supra*, to clearly identify and distinguish such access programming.

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[2]

Community	Population	Subscribers	When service began
Daytona Beach	45,327	3,840	March 1968
Volusia County	625	136	March 1968
Daytona Beach Shores	4,000	900	February 1965
South Daytona	5,000	775	March 1968
Port Orange	3,500	67	March 1968
Ponce Inlet	328	31	December 1971

The most distant community is located eight miles from the production facilities.

In view of the foregoing, the Commission finds that grant of the subject applications and temporary waiver request would be consistent with the public interest.

Accordingly, IT IS ORDERED, That Halifax Cable TV, Incorporated's request for temporary waiver of Section 76.251 of the Commission's Rules IS GRANTED to the extent reflected herein; and

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–554, CAC–555, CAC–556, CAC–557, CAC–558, and CAC–559) filed by Halifax Cable TV, Incorporated, ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-668

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by ROBERT W. HANSEN, ALTURAS, CALIF. For Renewal of License for Station KCNO	BR-2641

JUNE 21, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

MR. ROBERT W. HANSEN,
Radio Station KCNO,
Alturas, Calif.

DEAR MR. HANSEN: This refers to your application for renewal of license for Station KCNO, Alturas, California (BR-2641).

Station KCNO was granted as short-term renewal for the period ending May 24, 1973, because of your failure to exercise adequate supervision over the station's operations. We have reviewed your operation during the short-term renewal period, and find no evidence of any of the conduct for which the short-term license renewal was granted. We further find that you are legally, technically, financially and otherwise qualified to be a licensee and that a grant of your present application would serve the public interest, convenience and necessity.

Accordingly, the application for renewal of the license for Station KCNO, Alturas, California, is granted for the remainder of the regular renewal period for California stations—i.e., December 1, 1974.

Commissioner Nicholas Johnson concurring in the result. Commissioner Benjamin L. Hooks absent. Commissioner Richard E. Wiley not participating.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
STEPHEN M. HORNER, ANN ARBOR, MICH.
For Review of Denial of Access to Data

JULY 12, 1973.

MR. STEPHEN M. HORNER,
1833 Lake Lila Drive,
Ann Arbor, Mich.

DEAR MR. HORNER: This is in reply to your letter of May 7, 1973 in which you seek Commission review of my action of April 11, 1973 denying your request for access to certain financial and economic data filed with the Commission on a confidential basis by approximately 200 cable television systems.

As you are aware, the use of the term "cablecasting" in your initial letter made it appear that you were requesting only information about cable systems that engage in the local origination of programming. Because it is now clear that you are interested in currently operating cable systems regardless of whether they engage in local origination, it is my view that it would be feasible for us to grant your request. Assuming, as you have indicated, that you would be willing to limit your examination to 200 forms 325, to be selected at random by the staff, and to their corresponding forms 326, it is anticipated that the amount of staff time necessary to retrieve and prepare these forms for your examination should not be excessive. The shielding procedure you propose will, of course, permit you to examine the requested data without learning the identity and location of the particular cable system furnishing the information. However, because of the confidential nature of the data on the forms 326 and the necessity to protect it from disclosure, it will be necessary for a member of the staff to be present when you are using the forms.

I regret the delay in responding to your request and hope that the procedure described above will be satisfactory for your purpose. Arrangements for a mutually convenient time for examining the forms should be made through my office. We will need a reasonable amount of advance notice as to when you plan to be in Washington, D.C., in order to have the information ready for your examination.

Sincerely yours,

JOHN M. TORBET, *Executive Director.*

F.C.C. 73-685

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
BROADCASTING OF INFORMATION CONCERNING
HORSE RACES

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released June 29, 1973)

BY THE COMMISSION:

1. The Commission has before it a request filed May 3, 1973, by Harness Tracks of America (HTA), that the Commission clarify its Memorandum Opinion and Order of April 3, 1973, *In the Matter of Broadcasting of Information Concerning Horse Races* (FCC #73-355), for the purpose of "making it clear beyond any doubt that the nature of the advertising permitted O.T.B. [New York City Off-Track Betting Corporation] will be equally acceptable for advertising the pari-mutuel tracks which are licensed by the states for the same purposes that O.T.B. has been authorized." HTA specifically requests the Commission to add the words "pari-mutuel tracks" to its Memorandum Opinion and Order of April 3rd in order to make it expressly applicable to pari-mutuel betting. HTA states that it represents substantially all of the principal pari-mutuel Harness tracks in this country and Canada.

2. We think it is clear from a reading of the three principal Commission documents in this area, i.e. the 1964 Policy Statement,[1] the 1971 Declaratory Ruling,[2] and the previously mentioned April 3, 1973 Memorandum Opinion and Order,[3] that the Commission is using the same standard in issuing guidance to legalized on and off-track betting, and that legalized pari-mutuel betting may be advertised in the same manner as legalized off-track betting.

In the 1964 Policy Statement, which remains the basic expression of Commission policy in this area, it was clearly stated that the Commission did not intend to:

> . . . inhibit the broadcasting of appropriate news, publicity and advertising concerning horseracing. Horseracing and parimutuel betting at racetracks are, of course, permitted in many States. Indeed, the revenues derived from such legal parimutuel betting are of considerable significance to many States. These factors underscore the established role of horseracing, a role which the Commission recognizes and one which we do not wish to disturb.[4]

[1] 36 FCC 1571.
[2] 32 FCC 2d 705.
[3] FCC 73-355.
[4] 36 FCC 1571, 1573.

3. The 1971 Declaratory Ruling and the April 3, 1973, ruling were directed to OTB advertising because both rulings had been requested by OTB and were concerned with specific questions raised by OTB in regard to its advertising and promotional programs. It should be additionally noted that both rulings were interpretations of the 1964 Policy Statement. In the April 3, 1973 ruling we pointed out: "The revised ruling forbids advertising which directly aids or encourages illegal gambling. It permits advertisements which only induce people to follow the State's legalized betting course." [5] We think it is apparent from that statement, along with other expressions of Commission policy in this area, that the Commission's stated policy regarding broadcasting of horseracing information is currently applicable to the "State's legalized betting courses," whether that course be limited to pari-mutuel tracks or includes off-track betting facilities such as New York's OTB.

4. Accordingly, IT IS ORDERED, that the Request to Clarify Memorandum Opinion and Order filed by Harness Tracks of America IS GRANTED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[5] FCC 73–355 at para. 13.

F.C.C. 73-690

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
KAISER BROADCASTING CO., OAKLAND, CALIF.
To Modify Existing Condition Imposed
in Assignment of License of Station
WFLD-TV, Chicago, Ill.

JUNE 27, 1973.

AIR MAIL
KAISER BROADCASTING CO.,
300 Lakeside Drive,
Oakland, Calif.

GENTLEMEN: This is in response to your June 14, 1973 request to modify the existing condition imposed by the Commission in connection with the assignment of license for television Station WFLD-TV, Chicago, Illinois. On May 9, 1973 the Commission granted the assignment of WFLD-TV and other related television licenses to Kaiser Broadcasting Company and, due to a violation of our multiple ownership rules (Section 73.636(a)(2)) that resulted, imposed the following condition: Since Mr. George D. Woods had an attributable interest in eight television stations and Kaiser Broadcasting Corporation was in the process of selling KBSC-TV, Corona, California, the seven-station limitation would be waived for a period of one year or until the KBSC-TV sale was consummated (whichever occurs first); and that consummation of the WFLD-TV and related stations assignment should not take place until Mr. Woods executed a statement, submitted to the Commission, whereby he agreed not to participate in any matters relating to the broadcast interests of certain trusts so long as the station limitation violation continued to exist.

We have given careful consideration to your request for an amended condition due to your inability to obtain the required statement from Mr. Woods. The requested modification has been found to fully comport with the purposes behind our original condition and the suggested language you submitted is hereby adopted. Therefore, the subject applications will now be governed by the following conditions:

(a) a limited waiver of Section 73.636(a)(2) for a period of one year or until consummation of the sale of KBSC-TV (whichever occurs first), as contained in the Commission's letter of May 9, 1973;

(b) a proviso that the waiver will remain in effect only so long as no matter relating to the broadcast interests of Kaiser Industries Corporation comes before the shareholders of that corporation for a vote;

(c) a requirement that Kaiser Broadcasting Company notify the Commission 30 days in advance of any meeting of Kaiser Industries Corp. stockholders during the period of the waiver at which any matter relating to the broadcast interests of Kaiser Industries Corp. is scheduled to be voted upon; and

(d) a requirement that, before any such shareholders meeting is held, the grantee (Kaiser Broadcasting Company) and its majority partner (Kaiser Broadcasting Corp.) will eliminate any violation of the Commission's multiple ownership rules then obtaining which arises from the broadcast interests attributable to Mr. George D. Woods, by taking any appropriate steps available to them, including if necessary the surrender of the KBSC–TV licenses.

Commissioner Johnson dissenting.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-739

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
KENTUCKY COALITION FOR BETTER BROADCASTING, LOUISVILLE, KY.
For Extension of time To Protest License Renewal Applications

JULY 3, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
DR. JAMES W. COLEMAN,
Kentucky Coalition for Better Broadcasting,
3107 Wilson Avenue,
Louisville, Ky.

DEAR DR. COLEMAN: This is in reference to your telegram on behalf of the Kentucky Coalition for Better Broadcasting, which was received by the Commission on June 29, 1973. In your telegram, you request a thirty-day extension of time for formally protesting the license renewal applications for Stations WAVE and WAVE-TV, Louisville, Kentucky.

Section 1.580(i) of the Commission's rules provides, in substance, that a petition to deny a license renewal application must be filed on or before the first business day of the last full month of the station's license term. Licenses for broadcast stations located in Kentucky expire on August 1, 1973. Accordingly, a timely filed petition to deny was due July 2, 1973. Absent good cause shown, the Commission will not grant a waiver of Rule 1.580(i) to authorize the filing of a petition to deny after that date. See, *e.g.*, *WSM, Incorporated*, 24 FCC 2d 561 (1970) and *Trumbull County N.A.A.C.P.*, 25 FCC 2d 827 (1970).

In support of your request, you state that you have been negotiating with the licensee concerning the needs and interests of the black community and that the requested extension is necessary so that you may file a petition to deny in the event a satisfactory agreement cannot be reached. Orion Broadcasting, Inc., the licensee of Stations WAVE and WAVE-TV, opposes the requested extension of time.

To the extent that interested persons wish to avail themselves of our formal processes, they must either comply with the Commission's rules governing their usage or establish a reasonable predicate for a waiver thereof. On the basis of the information before us, the Commission concludes that the Kentucky Coalition for Better Broadcasting has failed to demonstrate good cause for waiver of Section 1.580(i) of our rules.

See *Congress of Racial Equality*, 27 FCC 2d 353 (1971). It should also be pointed out that your telegram was tendered with the Commission only three days before the deadline for filing a petition to deny the WAVE license renewal applications. As we stated in our letter of June 27, 1973 to the Chairman of the NAACP–MTCCC Negotiating Committee (FCC 73–709), "such last-minute requests, made without adequate supporting basis, will be denied." See also *Colorado Broadcast Stations*, 28 FCC 2d 375 (1971) and 29 FCC 2d 11 (1971). Our action, of course, is without prejudice to right of the Kentucky Coalition for Better Broadcasting to informally protest the license renewal applications for Station WAVE and WAVE–TV.

In view of the foregoing, IT IS ORDERED, That the request of Dr. James W. Coleman on behalf of the Kentucky Coalition for Better Broadcasting IS DENIED.

Commissioners Nicholas Johnson and Benjamin L. Hooks dissenting.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-691

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MT. MANSFIELD TELEVISION, INC., BENNINGTON, VT. For Construction Permit for New Television Translator Station	File No. BPTT-2459

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned application of Mt. Mansfield Television, Inc., licensee of television station WCAX-TV, channel 3, Burlington, Vermont (CBS), requesting a construction permit for a new 100-watt UHF television broadcast translator station to serve Bennington, Vermont, by rebroadcasting station WCAX-TV on output channel 69. The Commission also has before it for consideration two petitions to deny, one of which was filed January 23, 1973, by Rollins Telecasting, Inc., licensee of television station WPTZ(TV), channel 5, Plattsburgh, New York (NBC), and the other was filed January 26, 1973, by Albany Television, Inc., licensee of stations WTEN-TV, channel 10, Albany, New York (CBS) and total satellite station WCDC-TV, channel 19, Adams, Massachusetts, and various pleadings filed in connection therewith.[1] The Commission gave public notice of the acceptance of the application for filing on November 28, 1972. On December 27, 1972, Rollins filed a request for a thirty-day extension of time within which to file a petition to deny, its reason being the slowness of the mails due to the Christmas holiday season; Albany Television filed no such request. The Rollins petition is a two and one-half page document, accompanied by a four sentence affidavit executed December 26, 1972. It was filed nearly two months late. We do not think that Rollins has shown good cause for its failure to file such a document in timely fashion. Its request will be denied and both petitions will be dismissed as untimely filed. We will, however, consider both as informal objections filed pursuant to section 1.587 of the Commission's rules because they raise questions of policy which we think should be resolved.

[1] In addition to the foregoing pleadings, the Commission has before it for consideration an opposition to the petitions to deny, filed March 5, 1973, by the applicant; supplements to the opposition, filed March 6 and March 8, 1973, by the applicant; a reply to the opposition, filed March 22, 1973, by Rollins; and a reply to the opposition, filed March 23, 1973, by Albany Television.

2. There are no significant disputes of fact involved in this matter, but the problem involves the applicability of various Commission policies. The facts may be summarized as follows. The applicant is the licensee of the only commercial VHF television station licensed to a city in Vermont; it is affiliated with the CBS network.[2] Bennington lies about 25 miles beyond station WCAX–TV's predicted Grade B contour and is within the predicted principal city contour of UHF station WCDC–TV, channel 19, Adams, Massachusetts, which is a total satellite of station WTEN–TV, channel 10, Albany, New York, also affiliated with the CBS network. It is within WTEN–TV's predicted Grade A contour and WTEN–TV owns and operates one-watt VHF translator station WØ4AL in Bennington. Bennington is about 19 miles from Adams, Massachusetts, 32 miles from Albany, and 105 miles from Burlington. There is a cable television system in Bennington which carries, among other signals, those of WTEN–TV and the CBS-affiliate in Hartford, Connecticut, WTIC–TV, but it does not carry WCAX–TV. It provides program exclusivity to station WTEN–TV. Bennington is not within the predicted service contour of any Vermont commercial television station nor is it served by any translators rebroadcasting a Vermont commercial television station.

3. Both objectors claims standing as "parties in interest" within the meaning of section 309(d) of the Communications Act of 1934, as amended, but, because we have already determined that their pleadings must be dismissed as petitions to deny because they were untimely filed and we are considering them as informal objections, we do not reach the question of standing.

4. Both objectors oppose grant of the application, but contend that if the application is granted, it should be granted subject to a nonduplication condition to protect station WCDC–TV. Rollins claims that the applicant has not shown a need for the translator and Albany Television, Inc. (Albany), requests that program exclusivity should be provided with respect to syndicated and feature film programming as well as to network programming. Albany further insists that the cable television rules and policies should be applied to the proposal. We will consider each of these arguments separately.

5. Nothing in the Commission's rules or policies requires imposition of a nonduplication condition on the grant of an application for a UHF translator unless the translator is to be located in the city of license of a television station whose programs it would duplicate. E.g., *Cedar Rapids Television Company (K82AL)*, 23 FCC 2d 969, 19 RR 2d 358. Bennington is not the city of license of any television station and a nonduplication condition in conformity with the above-described policy is, therefore, inapposite. Where there are extraordinary circumstances which warrant a departure from that policy, however, such a condition will be imposed. *WGAL Television, Inc.*, 21 FCC 2d 345, 18 RR 2d 267. The *WGAL* case, however, was unique and the circumstances which warranted a departure from the general policy are not

[2] There are only six Vermont television stations, four of which are noncommercial educational stations. The only Vermont commercial television station other than station WCAX–TV is a UHF station, WVNY–TV, channel 22, Burlington, Vermont (ABC).

present here. There, we were concerned with a dominant VHF station seeking a UHF translator well beyond its predicted Grade B contour in order to compete in an all-UHF area within the predicted Grade B contour of an independently programmed UHF television station. It is conceded by all parties that Bennington is certainly not an all-UHF area nor may WCAX–TV be described as the area's dominant VHF station. In addition, the fact that station WCDC–TV is a total satellite station is, of itself, significant. Bennington is within WCDC–TV's predicted principal city contour, but not its city of license. It must be remembered that the restrictions imposed by our rules on the location of a translator outside its primary station's predicted Grade B contour are confined to VHF translators. Even if this were a VHF translator, however, the fact that WCDC–TV is a total satellite station would remove the impediment to a grant of the application. We discussed the rationale of this policy in *Marsh Media, Ltd.*, 18 FCC 2d 164, 16 RR 2d 529. Albany's position that the cable television rules and policies should be applied to translators is untenable and without any legal basis. Translators and cable systems are two entirely separate types of communications systems and receive different treatment pursuant to different rules and policies. The distinction has been recognized and sustained by the courts. *Community Television, Inc.* v. *United States of America, et al.*, U.S.C.A. 10th Cir., 1968, 15 RR 2d 2001.

6. The Commission has repeatedly stated that, insofar, as the necessity for an applicant to demonstrate a need for its proposed translator is concerned, an applicant is not required to show a need for the translator unless an objecting party first makes at least a *prima facie* showing of lack of need. E.g., *Telemundo, Inc.* (*W22AB*), 39 FCC 2d 829, 26 RR 2d 945; *Translator TV, Inc.*, 30 FCC 2d 435, 22 RR 2d 212. Such a *prima facie* showing is lacking here. We hold, therefore, that the applicant is not required to demonstrate a need for the proposed translator.

7. It is difficult to discover any significant adverse economic impact which could be caused to either of the objectors by reason of operation of the proposed translator station. Rollins, of course, does not serve the area and its claim of economic injury is based upon the questionable grounds that it would suffer competitive disadvantage in the Plattsburgh, New York-Burlington, Vermont, television market vis-a-vis WCAX–TV. See *North American Communication Corp.*, FCC 73–486, 27 RR 2d 832. The programs of station WTEN–TV are found on three places on the dial in Bennington, which includes the signals of a VHF translator station. Albany has not shown even a remote likelihood that, under these circumstances, the advent of a UHF translator would divert any significant amount of viewership. Thus, its claim that the proposed UHF translator would disrupt established viewing patterns in Bennington is unsupported. On the other hand, however, station WCAX–TV is one of two commercial television stations assigned to cities in Vermont. Neither of the objectors disputes the contention that there is a demand for Vermont-oriented programming in Bennington. Although we recognize that the New York State stations may carry some programs of interest to residents of

Vermont, these offerings cannot provide a substitute for subjects of vital interest to residents of Vermont, such as Vermont political affairs, Vermont news and legislative matters, local sports and cultural events, and other matters of public concern which are of interest principally to residents of Vermont. We think that the great public need in Bennington for such programs is obvious and we see the translator proposal as a means to meet this need.

8. We have already indicated that there is no warrant for imposing a nonduplication condition on grant of this application. Should circumstances change to a significant degree in the future, however, such as the conversion of station WCDC–TV into an independently programmed station, we would be disposed to review this matter in the light of such changed circumstances.

9. We find that there are no substantial or material questions of fact. We further find that the applicant is qualified to construct, own and operate the proposed new translator station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the request of Rollins Telecasting, Inc., for waiver of section 1.581(i) of the Commission's rules, IS DENIED; the petitions to deny filed herein by Rollins Telecasting, Inc., and Albany Television, Inc., ARE DISMISSED as untimely filed, and, considered as informal objections filed pursuant to section 1.587 of the Commission's rules, ARE DENIED.

IT IS FURTHER ORDERED, That the above-captioned application of Mt. Mansfield, Television, Inc., IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-742

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	Docket No. 19622
CONSIDERATION OF THE OPERATION OF, AND	RM-1967
POSSIBLE CHANGES IN, THE PRIME TIME	RM-1935
ACCESS RULE, SECTION 73.658 (k) OF THE	RM-1940
COMMISSION'S RULES	RM-1929

Petitions of
NATIONAL BROADCASTING CO., INC. (NBC)
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)
KINGSTIP COMMUNICATIONS, INC. (KHFI-TV, AUSTIN, TEX.)
(For Deletion of the Rule)
MCA, INC.
(To Permit the Use of "Off-Network" Material Plus 25 Percent New Material)

MEMORANDUM OPINION AND ORDER

(Adopted July 6, 1973; Released July 10, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE AND HOOKS DISSENTING.

1. The Commission here considers a "Motion to Postpone Oral Argument", filed on June 29, 1973 by American Broadcasting Companies, Inc. (ABC). The Commission issued a Notice of Oral Argument, FCC 73-657, June 18, 1973, which set the above captioned proceeding for oral argument July 30 and 31, 1973 and the date for filing written material of July 13, 1973. This proceeding is an inquiry into a proposed rule-making for the prime time access rule, Section 73.658(k) of the Commission's Rules. By its motion, ABC asks that the oral argument and the related date for filing of written material, be postponed until September 17, 1973 or as soon thereafter as may be convenient for the Commission.

2. ABC sets forth six reasons why the argument and additional comments should be postponed. (1) With regard to the request stated in the Notice of Oral Argument for information regarding programming for the Fall, 1973, ABC understands that in some instances it is not available. (2) The matter of the prime time access rule's impact upon the U.S. program production industry is a new area of focus, and a reasonable postponement would be helpful for the development of data. (3) Two parties to the proceeding, Westinghouse Broadcasting Company, Inc. (Group W) and the National Association of Independent Television Producers (NAITP), have filed petitions for modification or clarification of the Notice of Oral Argument, and the Commis-

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sion should act upon these petitions before the written comments are due. (4) Commissioner Johnson's term expired on June 30, 1973, and it is unclear whether he will continue to serve or will leave the Commission. ABC contends that due to the importance of this proceeding the issues therein should be considered and resolved by a full Commission, and that this is not currently possible. (5) The Commission is seeking the participation of principals as well as lawyers; yet the argument has been scheduled for the week of July 30, which coincides with the heart of the summer vacation period, thus making it inconvenient for many principals to participate. (6) A postponement will result in no significant delay of the resolution of this proceeding, as the Commission has indicated that it will not reach a decision before September.

DISCUSSION AND CONCLUSIONS

3. Upon consideration of this motion we are of the view that it should be denied. The bases upon which the motion by ABC rests are not sufficient for this proceeding to be delayed any further. We recognized in the Notice of Oral Argument that the programming data sought was that which was "predictable". With regard to the "new" information to be generated as to the impact of the prime time access rule upon the U.S. program production industry, the parties will have had more than a month to prepare by the time of the oral argument, which should be a sufficient amount of time. The two petitions by Group W and by NAITP will have been acted upon by the time written comments are due. With regard to the consideration of the prime time access rule question by a full Commission, and the uncertain status of Commissioner Johnson, we should not cease functioning merely because we are only six in number or because one Commissioner is uncertain about his future plans. The fact that the argument occurs in the heart of vacation time is not a valid consideration to delay the final outcome of this entire proceeding, which has been under consideration since October 30, 1972.[1] Finally, to delay the oral argument and further written submissions beyond those scheduled would adversely affect those parties which have already made arrangements for the dates stated in the Notice of Oral Argument.

4. In view of the foregoing, the "Motion to Postpone Oral Argument" filed on June 29, 1973 by the American Broadcasting Companies, Inc. (ABC), seeking postponement of oral argument and of the date for filing additional comments, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[1] Notice of Inquiry and Notice of Rule Making, FCC 72-957, 37 FCC 2d 900, released October 30, 1972.

F.C.C. 73-463

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO CLINTON, INC., CLINTON, MASS. Requests: 1530 kHz, 1kW (500 W-CH), Day For Construction Permit	Docket No. 19731 File No. BP-18171

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 11, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration (i) the above-captioned application; (ii) a petition to deny the application filed by Nashua Valley Broadcast, Inc., licensee of WLMS, Leominster, Massachusetts (Nashua); (iii) pleadings in opposition and reply; (iv) a supplement filed by Nashua; (v) a motion to dismiss filed by the applicant; and (vi) further pleadings in opposition and reply.

2. Nashua's petition to deny raises several questions which it contends warrant designation of this application for hearing. Although the proposed facility would not be located in the same community as Nashua's WLMS (Leominster is about nine miles from Clinton), there would be substantial overlap of the service areas and Radio Clinton would compete with WLMS for audience and revenues. Accordingly, we find the petitioner has standing within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of our rules. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 5 RR 2008 (1940).

3. Nashua first charges that grant of the Radio Clinton application would result in concentration of control of the broadcast media, contravening section 73.35(b) of our rules. Specifically, it states that the applicant's sole stockholder, Allan W. Roberts, also controls through General Broadcasting Corp. (Central) (of which he is 96.2 percent stockholder), WARE in Ware, Massachusetts, and WDEW, Westfield, Massachusetts, and that Roberts should be charged with an interest in stations WHIL-AM-FM, Medford, Massachusetts, through his association with Sherwood J. Tarlow and Joseph Kruger, both of whom hold ownership interests in the WHIL stations.[1] Nashua charges that the recent sale of Tarlow's and Kruger's interests in WDEW to Central (their interests totalled 66⅔ percent with Roberts holding the remainder individually),[2] severing their outright business association,

[1] WHIL-FM has secured a change of call sign and is now designated WWEL (with ownership unchanged).

[2] After consummation of the sale, Roberts continued to hold 33⅓ percent individually with the balance held through Central.

has not broken Roberts' tie to WHIL–AM–FM since he will remain in a debtor-creditor relationship as to his former associates and because of their "propensity to enter into joint business ventures." Nashua points out that Roberts, Tarlow, and Kruger are each interested in Central Cablevision Corp., a Massachusetts corporation organized for CATV operations. Nashua also charged Roberts with those broadcast interests held by Edward F. Perry, Jr., former optionee of Radio Clinton and technical director. Those interests are substantial ownership in WCIB–FM, Falmouth, Massachusetts, in Salem Broadcasting Company, Inc. (applicant for a standard facility in Salem, New Hampshire), and a 32 percent option in Radio Ridgefield, Inc. (applicant for a standard facility in Ridgefield, Connecticut).[3]

4. The applicant has responded by rejecting the petitioner's attachment of the Tarlow-Kruger stations to Roberts and by noting the dissolution of the joint control which previously existed for WDEW by the sale of Tarlow's and Kruger's interests to Central Broadcasting. It avers that Central Cablevision Corp., "holds no franchises, does no business, has no pending applications and . . . is inactive, defunct and awaiting formal dissolution." It has filed a document evidencing the termination of Perry's option. It states that the petitioner fails to allege the specific facts required to raise a 73.35(b) issue such as the number of people served and the extent of other competitive service to the areas.

5. Nashua replies by stating that "allied interests already control three standard broadcast stations . . ." whose 0.5 mV/m contours almost sweep Massachusetts from border to border. It submits that "the concentration is sufficient to warrant a hearing," citing *James B. Childress*, FCC 65–210, 4 RR 2d 764 (1965) and *Bangor Broadcasting Corp.*, 33 FCC 2d 677, 23 RR 2d 711 (1972).

6. The petitioner's concentration argument has been undermined by two events: the sale of the Tarlow-Kruger interests in WDEW to Central, and the termination of Perry's option in the applicant. Nashua's observations regarding the debtor-creditor relationship existing between Roberts and the former WDEW principals for the purchase price of their interests, and "their propensity to enter into joint business ventures" clearly fail to satisfy the terms of rule 73.35(b). Furthermore, the two existing low-power stations controlled by Roberts (WARE, Ware and WDEW, Westfield, Massachusetts) are nearly 30 miles apart and a Clinton facility would be located more than 30 miles from the nearer of these, WARE. No service area overlap would be involved, and each area receives substantial competitive service. Accordingly, we find no concentration of control issue existing as to Radio Clinton's application.

7. Next we turn to the claim that Radio Clinton is financially unqualified to construct and operate the proposed station, a claim discussed at length in WLMS' assorted pleadings. In order to handle the numerous exceptions raised by the petitioner, we will reduce them to three allegations: that Central Broadcasting Corporation, licensee

[3] Roberts has dismissed another of his applications, that of Webster Broadcasting Company, Inc., for an AM facility in Webster, Massachusetts, and sold his controlling interest in Salem Broadcasting Company, Inc.

of stations WARE, Ware, Massachusetts, and WDEW, Westfield, Massachusetts, does not possess sufficient funds to cover the operation of its two existing stations, pay the purchase price for WDEW, and loan $100,000 to Radio Clinton;[4] that the applicant has understated the amount of money necessary to construct and operate the proposed station for one year; and that the applicant has not met the burden of demonstrating its financial ability to support the continued operation of the station.

8. As to the first point, Nashua argues that the Commission requires renewal applicants (WARE in this case) to show sufficient "quick assets to meet current liabilities" and that, consequently, Central's assets must be reduced by WARE liabilities in the amount of $31,126. It states that Central's assets are further depleted by the acquisition costs for WDEW through the first year—$19,488— as well as the gap between WDEW's quick assets and current liabilities, or $24,770. These, and other deductions[5] would leave Central with only $7,248 in liquid assets and unable to show the wherewithal for a $100,000 loan. Petitioner's calculations are supported by its corollary argument that WDEW's 1971 deficits and WARE's limited profitability vitiate the applicant's plan to cover WARE and WDEW costs with Central's *revenues*, while saving Central's *assets* intact for its loan to Radio Clinton.

9. Although the petitioner's premise is faulty,[6] a substantial doubt nevertheless remains as to the soundness of the applicant's financing strategy. As disclosed in exhibit 8 to its WDEW transfer application, WARE had a positive cash flow in excess of $50,000 in 1969 and 1970, a figure substantially exceeded in 1971. WARE's financial position may be more than adequate to cover WDEW's acquisition costs of $20,901 for the first year[7] and the reduced figure of $13,887 for each year thereafter. However, in view of WARE's position as the keystone holding this plan together, and considering the deficits reported for WDEW in 1971, Radio Clinton's financial showing needs further, more current information.

10. For the second prong of its financial challenge, Nashua alleges that the applicant has underestimated its first-year construction and operating costs. It states that the cost figure for the applicant's current proposal is $3,000 less than that cited in 1968, despite the pressures of inflation. Petitioner also points to the proposed staff of nine employees, projects their average salaries, and concludes that stated manpower costs are too low. While the applicant's cost estimates do not appear unreasonable, their age (January 1971) and that of the equipment supplier's credit letter (December 1970) require us to call for an amendment updating this phase of its proposal.

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[4] Radio Clinton also relies on a $100,000 loan commitment from the Capitol Bank and Trust Company of Boston, Massachusetts.

[5] Nashua states that a "minimally reasonable estimate" for the legal fees, closing costs, etc., that must be charged to Central for its acquisition of WDEW would be $4,000.

[6] Unlike the situation of the applicant for a new station, renewal and transfer applicants need not show quick and current assets sufficient to match current liabilities. Rather, the Commission examines the overall financial health of the licensee, with cash flow a focal point for analysis.

[7] The difference between our figure for first-year acquisition costs and that cited by Nashua is accounted for mainly by our including one-half of the grant fee as part of Central's costs.

11. Nashua charges that serious doubt surrounds the prospects of Radio Clinton surviving its second year of operation.[8] It cites the applicant's 100 percent debt financing and the burden of loan repayments beginning in the second year, However, it would be pointless to probe prospects for second-year survival until the applicant has settled its first-year qualifications. If the facts as later established seem to warrant such an inquiry, then parties to the hearing may petition for an enlargement of the issues.

12. Finally, petitioner criticizes the Capitol Bank and Trust Company loan to Radio Clinton as merely conditional since it was premised on subsequent bank approval of Roberts' financial condition, a situation it says parallels that in *D. H. Overmeyer Communications, Co.*, FCC 65–1151 (1965). But as the Review Board noted in a sequel to the above Order, *D. H. Overmeyer Communications, Co.*, 4 FCC 2d 496, 499–500, 8 RR 2d 96, 101–02 (1966), a bank loan is not conditional where the prospective lender clarifies his terms, reaffirms his willingness to make the loan, and states that subsequent approval of the borrower's credit is merely intended to guard against future adverse changes in the applicant's financial picture. Capitol Bank has four times affirmed its willingness to make the loan and has supplied its terms and conditions.

13. The next broad objection made by Nashua is a congeries of section 1.65 and candor claims. A principal criticism is that Radio Clinton neglected to report that the views of those interviewed for its community survey had changed after WLMS commenced service in nearby Leominster. This shift, according to the petitioner, shows that Clinton residents no longer felt a new station was needed. Nashua has tried to graft a superfluous consideration onto the Commission's community survey policy which is to insure that potential licensees make thorough efforts to ascertain the problems of their communities and that they formulate programming responsive to those needs. The survey is not, a Nashua seems to assume, an inquiry into the desirability or practicability of a new station. That goes to the commercial feasibility of a station and is properly left to the business judgment of the applicant. Moreover, we doubt that mere inauguration of WLMS service would have solved all the problems voiced by those whom Radio Clinton interviewed: unemployment, drug abuse, high taxes, need for a new school, etc. Accordingly, the fact that those interviewed may have changed their minds about the desirability of a new station and that this went unreported, is irrelevant to the community survey, and immaterial for purposes of rule 1.65.

14. With the exception of Nashua's argument that the applicant violated section 1.65 by failing to disclose "that its community survey had been rendered moot by the initiation of service by WLMS," each of the candor and 1.65 issues discussed below was first raised in the petitioner's supplemental pleadings. The first of these was styled a "Supplement to Petition to Deny" and was filed nearly three years after its reply pleading (at which point Radio Clinton's application was ripe for processing). The petitioner sought to justify the filing of

[8] *Cf. Ultravision Broadcasting Co.*, 1 FCC 2d 544, 547, 5 RR 2d 343, 347–48 (1965).

its extraordinary supplement by citing the fact that the application has been amended ten times subsequent to the filing of the original petition to deny, as well as "the passage of time, and correlative changed circumstances. . . ." Nashua has shown good cause for our considering its supplementary discussion of financing and concentration of control, but it made no effort to justify the late raising of the candor allegations found in its supplement, matter which had been available for discussion during the first round of pleadings three years before. The petitioner's final pleading (styled a "Reply" and received May 12, 1972) adds further allegations which could have been delivered well before. Nevertheless, in view of the serious matters raised in these supplements, we will consider their merits and Radio Clinton's motion to dismiss the supplement will be denied.[9]

15. The petitioner argues in its March 10, 1972, pleading that Radio Clinton failed to keep a copy of its current balance sheet on file. The applicant did not submit its September 30, 1971, balance sheet to the Commission until November 23, 1971. However, in view of the evident absence here of any motive to withhold the information (Central's financial position had improved since the previous annual statement), this relatively small reporting delay will be deemed insignificant. Nashua charges the applicant with a failure to disclose that the WDEW transfer and WARE renewal and the Radio Clinton application all rely on the same Central funds. However, it was stated explicitly in the WDEW transfer application that WARE and WDEW would be funded with Central revenues; and while the separate nature of the funding for Radio Clinton was not made clear until after Nashua filed this allegation, the defect was insubstantial and has been corrected. The alleged failure to keep the Commission posted as to Allan W. Roberts' current financial status was corrected by the applicant's submission of April 3, 1972, and any omission is considered insignificant.

16. The petitioner criticizes the Central balance sheet of September 30, 1971, for failure to report the liabilities associated with the prospective acquisition of WDEW. However, these liabilities remained conditional until Commission sanction had been given the transfer, an action not taken until February 22, 1972. The next criticism is that the applicant withheld the second page of Central's balance sheet. An applicant proposing to rely on a loan from other than a financial institution need only file a current balance sheet for that person or company, unless the applicant proposes to shoulder its costs by relying on the lender's operating revenues. In this case, we require a profit and loss statement from the lender. Radio Clinton's plan to draw loan funds from Central's revenues has been substantiated by the disclosure of WARE's and WDEW's 1969 and 1970 cash flows in Central's WDEW transfer application. The applicant cannot reasonably be accused of being "deliberately furtive" when it had already made the essential profit and loss figures public. Nashua's charge that the applicant has failed "to reveal the extent and location of other

[9] We have considered the applicant's letter of counsel received May 23, 1972, which objected to Nashua's raising new matter in its May 12, 1972, reply. For the reason noted we have found the applicant's objection unpersuasive.

broadcast interests" is a bald conclusion without specificity, and is rejected. It is true that the applicant failed to cross-reference the pendency of WARE's renewal, and had yet to report grant of the WDEW transfer at the time these deficiencies were pointed out. However, regarding the latter, Radio Clinton was still well within the 30-day time period for disclosure when Nashua made its objection; and concerning the former, our staff had been aware of developments in the WARE matter and thus, while the applicant should have cross-referenced the renewal matter, its failure to do so will not be considered a material omission.

17. Nashua charges that Allan W. Roberts, in his capacity as principal stockholder in a former applicant corporation, Webster Broadcasting Co. (Webster Broadcasting), and in Central Broadcasting Co., a Commission licensee, deliberately misrepresented facts to the Commission in connection with Webster's now-dismissed application for a first broadcast facility in Webster, Massachusetts. Nashua charges that Roberts is responsible for distortions in Edward F. Perry, Jr.'s reported dealings with Nichols College,[10] to wit: by stating that Webster Broadcasting had obtained "an indepth survey" of Webster's needs from the college; that it had established a working relationship with the college; and that Nichols had agreed to produce a weekly educational series. Second, Nashua asserts that the coverage maps formerly included on the WARE rate cards exaggerate the scope of WARE's effective coverage by depicting parts of Springfield and Worcester as included in the WARE service area. Third, Nashua adopts a medley of charges initially contained in a petition to deny Roberts' Webster application filed by the licensee of station WESO, Southbridge, Massachuseetts (WESO). These include claims that Roberts distorted the responses of several of those interviewed for Webster's community survey by attributing remarks to them which they did not make (such as "station WESO does not provide adequate local coverage to Webster . . ."); by stating that certain individuals had agreed to serve on the station's advisory board, while, according to WESO, they had not so agreed; concluding with the charge that Roberts inflated the degree of support for a new station. WESO also accused Roberts of falsely affirming the existence of a $100,000 line of credit from the Hartford National Bank, and of equivocating as to the continued viability of a $45,000 loan commitment from the Ware Trust Co., and a $100,000 commitment from the Heritage Bank and Trust Co.[11] It charged that Webster Broadcasting made a "completely false, deceptive and misleading" statement when it effectively denied that Roberts' WARE sought to cover Southbridge. (This denial was in answer to WESO's complaint that a grant of the Webster application would leave Roberts with an effective duopoly over Southbridge since that community is "sandwiched" between Ware and Webster). Lastly, the petitioner has faulted the applicant for a failure to report the al-

[10] Perry, an officer and director of Webster Broadcasting, represented it in conversations with Professors Phelps and Choo of the College.

[11] The Hartford National Bank and Ware Trust Co. loans were for Salem Broadcasting Co., Inc. The Heritage Bank and Trust Co. loan was slated for Webster Broadcasting Co., Inc.

leged extension of Edward F. Perry, Jr.'s option to acquire 25 percent of Radio Clinton's stock.

18. Radio Clinton has responded to these sundry allegations in the following manner. It opposes the Nichols College charges by stating that: (i) Webster Broadcasting disputed the alleged misrepresentation in its opposition and filed affidavits urging its version of contacts with the school; (ii) by reading the conflicting affidavits and materials together, it concludes that the dispute "hardly even rises to the level of an honest misunderstanding"; and (iii) that that matter is of no decisional significance for the Clinton application since it surfaced "in the context of a completely separate application." Radio Clinton denies distortion of WARE's coverage map and states further that such maps are no longer included on its rate card. It opposes the other charges by stating that "Mr. Roberts had the oral assurance of an official of the [Hartford National B]ank that it could accommodate the needs of Salem Broadcasting Company, Inc."; by Roberts' denial that he had already borrowed the $45,000 committed for Salem; by denying that its commitment from Heritage Bank and Trust had been jeopardized by changes in the money market. Webster Broadcasting also attacked the reliability of WESO's detective agency report noting that it was unsworn and unsigned. WESO's charges regarding Webster's alleged community survey distortions were raised in WESO's reply pleading to which there was a denial but no formal response by the applicant.

19. It is our opinion that several of these allegations generate material and substantial questions as to Radio Clinton's candor. We take note of the fact that these charges center around events occurring over three and four years ago in the context of an entirely separate proceeding. Further, Roberts secured the dismissal of his Webster Broadcasting application nearly two years ago. Nevertheless, the unity of control among Webster Broadcasting, Salem Broadcasting and Radio Clinton renders the unresolved allegations against the first two applicants relevant to our consideration of the last.

20. First the Nichols College matter. The affidavits submitted by Edward F. Perry, Jr., and Carol A. Ebert can be reconciled with that of Professors Choo and Phelps of Nichols College on two points. While the professors disputed Webster's claim to have established "a working relationship" with the College, Perry's sworn statement, corroborated by that of Phelps, detail contacts repeated and protracted enough to warrant the applicant's description. Likewise, the applicant's claim to have obtained "an indepth survey" from the College is simply a semantic tussle. The professors may understandably have been jealous to guard the professional reputation of Nichols College and their Bureau of Business and Economic Research, and "an in-depth survey" clearly connotes specific procedural steps to the professors, at least more substantial than a student poll. However, it does not seem beyond the boundary of reasonableness for the applicant to so describe its survey, particularly given the vagary of the phrase. The fact that Webster Broadcasting may have put the best possible interpretation on the service it received, through Professor Choo's

coordination, is not enough to raise a substantial question as to misrepresentation.

21. Webster Broadcasting's claim that "Nichols College has already agreed to produce a weekly educational series," is of a different sort. It is clear that the College has not done so. The question is whether, in view of Professor Choo's undenied enthusiasm for the idea, it was unreasonable for Webster to so construe his response. Since Perry admits requesting a letter documenting the ways the College would use the time offered, and since this letter was never forthcoming, it seems precipitous for Roberts to have concluded that "Nichols College has already agreed. . . ." A conflict is squarely presented here and an issue will be designated to resolve whether this should be considered a misrepresentation.

22. We next turn to allegations launched by WESO and simply adopted by Nashua for use against Radio Clinton and Roberts. These charges involve the alleged community survey distortions, financial sleight-of-hand, and WARE's coverage, with the community survey matters discussed first. WESO offered signed statements from interviewees in support of its charge that Webster Broadcasting had distorted their true responses, a distortion the core of which was that WESO did not provide adequate local coverage. The relevant remarks from the Webster Broadcasting interview with George O. Emanuelson read, "Mr. Emanuelson felt that the area 'certainly needs another station'; that the area is not adequately covered by WESO. . . ." While leaving undenied the desirability of another station, WESO's interview reports Emanuelson as recalling he said nothing at all about WESO's coverage. The conflict between Emanuelson's denial and Webster Broadcasting's version (which is simultaneously beneficial to itself and damning to its opposition) carries the clear possibility of misrepresentation which should be settled in an evidentiary proceeding.

23. The same type of remark about WESO's local coverage was ascribed to Messrs. Philip Joslin, Theodore Chmura, and Jeremiah Moriarty. However, according to WESO's interview, Chmura and Moriarty said just about the opposite, i.e., that WESO's local coverage was adequate, while Joslin stated to WESO's representative that he had expressed no opinion on the adequacy of the station's coverage. Again, in each instance a substantial doubt is raised as to the candor of the former applicant's representations to the Commission, and Mr. Roberts will be called upon at hearing to dispel these doubts.

24. The last two aspects of these community survey allegations are that Webster Broadcasting inflated the number agreeing to serve on its advisory board from 15 to 20, and that the alleged "overwhelming consensus" in favor of a local Webster facility was, in fact, based on five favorable interviews out of 36. Even if WESO's allegations are correct, neither of these claims is significant enough to raise a substantial and material question of fact.

25. WESO's charges of misrepresentation went beyond Roberts' Webster Broadcasting application. Roberts was also the controlling stockholder in Salem Broadcasting Co., Inc., applicant for a new facility at Salem, New Hampshire. WESO charged that some time after

the effective date of a $45,000 Ware Trust Company loan commitment to Salem Broadcasting, Roberts borrowed (and later repaid) this sum from Ware Trust, extinguishing any further obligation in the same amount to Salem Broadcasting, and rendering his continued reliance on the Ware Trust loan possibly misleading. Webster Broadcasting denied "that the $45,000 committed for Salem by the Ware Trust Company [had] already been borrowed . . .," leaving open, so said WESO, the possibility that Roberts had, in fact, borrowed the $45,000, but for another purpose. This presents a substantial conflict which could have significant implications as to Mr. Roberts' fitness and, accordingly, an issue is designated.

26. The second WESO financial allegation also generates a substantial question of fact. In the Salem Broadcasting application it was stated that, "The applicant has arranged for a long time line of credit in the amount of $100,000 from the Hartford National Bank. . . . The applicant expects to obtain a written loan commitment letter from the bank very shortly." This letter was not forthcoming and WESO charged that no formal application had ever been made, much less a loan arranged. Webster Broadcasting stated in opposition that Roberts "had the oral assurance of an official of the bank . . .," but that since Hartford "had participated in the Heritage Bank loan for Clinton . . . [it] could not therefore, also provide additional sums for Salem." This concerns another substantial matter, and Roberts will be given the opportunity to resolve the conflict.

27. In the third and last financial charge, WESO questioned the vitality of a Heritage Bank and Trust Company commitment to Webster Broadcasting. WESO's detective agency reported bank officials as doubting the currency of the loan commitment in view of changed market conditions. The commitment letter was then about a year old. Webster Broadcasting flatly denied any softening of the commitment, but also secured an agreement with another institution with what was said to be the best terms available at the time. No substantial or material question is raised when an applicant denies in argumentative fashion the weakening of a commitment, which is partly a matter for interpretation, at the same time taking action which may concede the point. Some leeway must be allowed for the rigors of pleading.

28. There is no doubt that the coverage map formerly included in WARE's rate card exaggerated the scope of its effective service area. In addition, the map depicts WARE as serving parts of Worcester and Springfield with an 0.5 mV/m signal (inadequate for an urban area under rule 73.182(f)) and fails to disclose that its nighttime directional radiation is oriented away from these major markets. The potential for misleading advertisers is evident here, and the fact that WARE has since discontinued use of a coverage map on its rate card does not obviate the need for further inquiry (*see e.g., Universal Communications of Pittsburgh, Inc.*, 21 FCC 2d 542, 18 RR 2d 491 (1970)).

29. One of WESO's objections to a grant of the Webster application was premised on the argument that this would allow Roberts an effective duopoly over the Southbridge area (WESO's community of license) since, so it said, Roberts' WARE programmed for South-

bridge as well as Ware and a Roberts-controlled Webster station would do the same (Southbridge is between, and in proximity to, Ware and Webster). WESO included excerpts from verbatim transcripts of WARE broadcasts to show that Roberts' disavowal of any intention to program for Southbridge was "completely false, deceptive and misleading." The excerpts contained references to Southbridge births; claims to be entertaining "many towns" in the area, among them Southbridge; and the sponsorship of WARE news by Southbridge merchants. Apart from pointing out that allegations such as these fail to satisfy the requisits for a duopoly issue (section 73.35(a)), Webster Broadcasting noted that WARE's signal was too weak to satisfy the Commission's coverage requirements for a town the size of Southbridge. The former applicant also stated that WARE sold time to Southbridge merchants so they could reach Ware residents and that "WARE is not aware that it has any audience in Southbridge itself." WESO then responded with statements from Southbridge merchants saying that WARE represented that it was trying to reach Southbridge residents. The petitioner also stated in a conclusory fashion that traditionally Ware residents do not shop in Southbridge. Faced with the explicitness of Webster Broadcasting's denials, and WESO's just as explicit transcript excerpts and merchant surveys, we must designate yet another candor issue against Roberts' instant application.

30. Perry's option in the applicant is now terminated, but there remains considerable doubt over the termination date, which may have been beyond the three-year duration initially specified. For example, in paragraph 5 of the applicant's opposition pleading received April 3, 1972, the language suggests that Perry would be able to exercise his option at some point in the future, although it was apparently due to expire five days from that date.[12] In view of this, and the fact that the letter confirming termination is dated August 1, 1972, we feel a substantial doubt exists as to the applicant's compliance with rule 1.65.

31. In its petition to deny,[13] Nashua attempts to raise a *Carroll*[14] issue arguing that a grant of Radio Clinton's application would cause it severe economic injury and result in considerable degradation of WLMS' service to the public. Although it is a relatively new station, Nashua states that WLMS has done much to fulfill the local programming needs of the communities, including Clinton, in its service area. To this end, WLMS has devoted 21.5 percent of its total broadcast time to news, with more than 40 percent of the news time devoted to local news; provided weekly religious programs; donated broadcast time for various charitable causes; and proposes a weekly thirty (30) minute program, entitled "Insight," to provide local authorities with a forum to discuss various community problems. Nashua also claims that WLMS' financial position is tenuous. Specifically, it points out that it compiled a deficit of over $17,500 in 1967; that in 1968, its first

[12] This is based on the presumption that the option's term began to run no later than the date of Radio Clinton's application reporting the option, or April 8, 1972.
[13] This argument is dropped from its supplemental pleadings.
[14] *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958).

full year of operation, it made a profit of only $288; that 16 percent of its 1968 revenues came from Clinton and to a lesser extent, three small communities adjacent to Clinton; that a loss of a mere 2 percent of its Clinton accounts could place WLMS in a deficit again; and that, based upon its experience and knowledge of Clinton, it estimates it will lose 80 percent of its Clinton revenue to a new station in Clinton and, thereby, jeopardize its survival by creating an annual deficit in excess of $10,000. Furthermore, it proffers certain statistics that it argues show that Clinton is no longer a growing community and cannot generate the revenues necessary to sustain two stations.[15] Finally, Nashua states that if it lost 80 percent of its Clinton revenues, it could not realistically expect to earn that revenue elsewhere. As a result, the petitioner estimates it would be forced to reduce its public interest programming by cutting its news broadcasts approximately 50 percent, reducing public affairs shows and curtailing remote broadcast of local athletic contests.

32. In opposition, Radio Clinton argues that the petitioner has not supplied sufficient factual data to meet the Commission's standards for the specification of a *Carroll* issue. Moreover, Radio Clinton characterizes the allegations as either misleading or erroneous. It contends that WLMS has not successfully fulfilled the programming needs of Clinton since WLMS devotes most of its efforts to the immediate and specific needs of Leominster and Fitchburg. It also claims that WLMS' financial position has substantially improved. It challenges the petitioner's characterization of Clinton as a "town whose most prosperous years lie in the past." [16] Finally, Radio Clinton states that inasmuch as its proposed 2 mV/m contour will barely penetrate the municipal limits of Leominster, it would not regard Leominster as a primary source for revenue, and would consider service to that area, in competion with WLMS, to be incidental to its primary service to the Clinton area.

33. It is firmly established that a party seeking to raise a *Carroll* issue must plead specific factual data rather than generalized and conclusory allegations of public injury; i.e., "statistics as to the number of businesses in the area, total volume of retail sales, other advertising media, the number of area businesses which do not presently advertise, cost of public service programming, and other data related to the economics of broadcasting which may tend to show that the area involved could not support another station without loss or degradation of program service to the public." [17] The petitioner's allegations are conclusory generalizations conveying little of the hard economic data essential for a reasoned determination that the public interest might be harmed by a grant of this application. Instead of the supportive material enumerated above, Nashua proffers a general sociological outlook

[15] WLMS avers that in the period 1955–65, Clinton suffered an out-migration of 789 persons. Moreover, it classifies Clinton as a working class city with a lower standard of living than other parts of Massachusetts (the median income in Clinton is $5,687, while being $6,272 statewide).

[16] The applicant argues this conclusion is clearly refuted by several major studies conducted by the Lowell Technological Institute Research Foundation and the Massachusetts Department of Commerce and Development as part of the Eastern Massachusetts Regional Planning Project.

[17] *WLVA, Incorporated* v. *FCC*, 148 U.S. App. D.C. 262, 273, 459 F. 2d 1286, 1297, 23 RR 2d 2081, 2096 (1972).

for Clinton and a bald estimate that it would lose 80 percent of its Clinton revenues. It includes no figures for amounts spent on various advertising media in the area, the number of businesses not presently advertising on radio, the WLMS advertisers which would be lost to a Clinton facility, the costs for its public service programming, or other data necessary to substantiate its estimate that it would lose in excess of $10,000 annually. WLMS' earnings report is more favorable, in marked contrast to the net profit of $228 reported for 1968. Finally, it should be noted that a *Carroll* issue is typically raised where a new station is proposed in the same or adjacent community as that of an an existing station. It follows that the farther apart the respective cities of license, the less the competitive impact, and the greater the burden of showing that a *Carroll* problem exists. Here the petitioner's city of license is Leominster, about nine miles from Clinton. Nashua's failure to plead facts sufficient and particular enough to warrant specifying a *Carroll* issue is underscored by this separation.

34. Finally, the petitioner alleges that the applicant has failed to comply with the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). It states that the applicant's surveys do not contain an adequate geographic sampling of people living in communities that will fall within the proposed service area; that the leaders consulted do not represent a cross-section of Clinton since the applicant did not consult representatives of the professions, charitable organizations, officials of the Atlantic Union College, leaders in the entertainment field, or elected officials; that some individuals contacted initially by the applicant have indicated subsequently that there is no community support for a new station; that there is no in-depth evaluation of the suggestions received; that the applicant's proposal offers nothing positive to alleviate the problems that exist; that the first surveys were conducted in 1967 and 1968, before WLMS had started or had just commenced broadcasting, and that the people consulted could not have evaluated the role of WLMS in formulating their views of community problems.

35. The applicant has submitted five supplemental surveys in addition to the survey originally tendered with the application. Analysis of the data indicates that the applicant has complied with the *Primer*. It has listed the identity, by name, position, and/or organization of approximately 60 community leaders and the names of 148 members of the general public that it contacted. The leaders consulted by the applicant represent an adequate cross-section of Clinton, a city with a population of 13,270. A number of charitable, social, and civic organizations were contacted, including the Clinton Turn Verein Club, the Knights of Columbus, and the Italian-American War Veterans. In addition, the various religious faiths and a number of government officials, including the Clinton police chief, selectman, and tax assessor were interviewed. The general public survey is extensive, considering the population of Clinton and the other areas that the proposal would serve, and it has a good geographic balance with approximately half the individuals being residents of communities other than Clinton. Furthermore, the applicant listed the suggestions that it received and has proposed eight specific programs in response to community prob-

lems. The fact that WLMS started broadcasting at the time the applicant conducted its first survey does not vitiate its ascertainment efforts. As noted earlier, we feel safe in assuming that mere inauguration of radio service would not resolve the serious concerns noted by Clinton residents. Moreover, the applicant's supplemental surveys over a four-year period would have registered any shifts in perceived problems. The applicant has made a detailed and thorough study of the needs of the area in attempting to fulfill the requirements of the *Primer*. It has corrected the deficiencies that existed in its original survey, and no purpose would be served by examining the matter further in hearing. Accordingly, the petitioner's request for specification of a community needs issue will be denied.

36. From the information before the Commission it appears that, except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. However, for the reasons indicated above, it must be designated for hearing on the issues set forth below.

37. Accordingly, IT IS ORDERED, That the application of Radio Clinton, Inc., IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the application of Radio Clinton:
   (a) Whether Central Broadcasting Corporation has sufficient net liquid and current assets to meet its loan commitments to Radio Clinton, Inc.;
   (b) The current basis for the applicant's estimated construction costs and operating expenses for the first year; and
   (c) In light of the evidence adduced pursuant to (a) and (b), above, whether the applicant is financially qualified.
2. To determine whether Webster Broadcasting Company, Inc., made misrepresentations to the Commission or was lacking in candor with respect to:
   (a) Its alleged program production agreement with Nichols College;
   (b) Statements in its community survey concerning the adequacy of station WESO's coverage;
   (c) Statements regarding the $45,000 Ware Trust Company loan;
   (d) Statements made concerning a $100,000 loan from Hartford National Bank to Salem Broadcasting Company, Inc.; and
   (e) Statements concerning station WARE's program service to Southbridge, Massachusetts.
3. To determine whether Central Broadcasting Corporation, as licensee of WARE, Ware, Massachusetts, employed a deceptive coverage map on WARE's rate card.
4. To determine, in light of the evidence adduced pursuant to issues 2 and 3, above, whether the applicant has the requisite qualifications to be a licensee of the Commission.
5. To determine whether Radio Clinton, Inc. has complied with the provisions of section 1.65 of the Commission's rules by keeping the Commission advised of substantial and significant changes as required by section 1.65, and, if not, the effect of such non-compliance on its basic qualifications to be a Commission licensee.
6. To determine, in light of the evidence pursuant to the foregoing issues, whether the application should be granted.

38. IT IS FURTHER ORDERED, That, Radio Clinton, Inc.'s motion to dismiss the supplement to the petition to deny IS DENIED.

39. IT IS FURTHER ORDERED, That, the petition to deny, as supplemented, of Nashua Valley Broadcast, Inc., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

40. IT IS FURTHER ORDERED, That, Nashua Valley Broadcast, Inc., licensee of station WLMS, Leominster, Massachusetts, IS MADE A PARTY to the proceeding.

41. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under issue (1), and the burden of proof on all issues, shall be upon Radio Clinton, Inc.; and that the burden of proceeding under issues (2) through (5) shall be upon Nashua Valley Broadcast, Inc.

42. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant and party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

43. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE APPARENT LIABILITY OF STATION WGLD–FM, OAK PARK, ILL. FOR FORFEITURE	}

APRIL 11, 1973.

The Commission by Commissioners Burch (Chairman), H. Rex Lee, Reid and Wiley, with Commissioner Hooks concurring and issuing a statement and Commissioner Johnson dissenting and issuing a statement, issued the following NEWS RELEASE:

WGLD–FM, OAK PARK, ILL., APPARENTLY LIABLE FOR $2,000 FORFEITURE FOR OBSCENE OR INDECENT PROGRAMING

Sonderling Broadcasting Corporation, licensee of WGLD–FM, Oak Park, Ill., has been notified by the FCC of its apparent liability for forfeiture of $2,000 under the provisions of Section 503(b)(1)(E) of the Communications Act because it violated Section 1464 of Title 18 of the United States Code by broadcasting obscene or indecent matter on its "Femme Forum" shows of February 21 and 23, 1973.

Section 1464 provides that anyone who "utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." Under Section 503(b), a forfeiture not to exceed $1,000 can be assessed for each day on which a violation occurred, with a maximum of $10,000 in any notice of forfeiture.

At the time of the violations, WGLD–FM was using a "topless radio" format in which an announcer takes calls from the audience and discusses mainly sexual subjects. The February 21 program dealt with the topic of "How do you keep your sex life alive?" and some callers suggested oral sex. The February 23 program was about oral sex and consisted of explicit exchanges in which female callers spoke of their oral sex experiences.

The Commission, recognizing the licensee's right to present provocative or unpopular programing which might offend some listeners, emphasized that it was *not* saying that sex is a forbidden subject on the broadcast medium. It said that it was confronted with a show where the interviewer could readily moderate his handling of the subject matter so as to conform to the basic stautory standards.

The Commission said that in the past it had "scrupulously refused" to decide which programs were consistent with the public interest and which were not, even when confronted with the most distasteful programing, because that would be "flagrant censorship." To try to rule off the airwaves the "coarse or the vulgar" would also be an effort at

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censorship, but here the standards are strictly defined by law, the Commission said, and the broadcaster must shun the "obscene or indecent."

The Commission pointed out that the Supreme Court has defined obscenity in the following terms: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court has also ruled that it must be established that the dominant theme of the material appeals to a prurient interest in sex; that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and that the material is utterly without redeeming social value.

In determining whether broadcast material meets the statutory test, the special quality of the medium must be taken into account, the Commission said. Thus while the criteria for judging whether some broadcast material is obsence or indecent remains the same, it is crucial, the Commission stressed, that these criteria are being applied in the broadcast field, "a medium designed to be received and sampled by millions in their homes, cars, on outings, or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication."

If broadcasters can engage in commercial exploitation of obscene or indecent material, the Commission noted, an increasing number will do so for competitive reasons. It said that "topless radio" formats like "Femme Forum" are designed to garner large audiences through titillating sexual discussions, that the explicit material used in the two February shows "is patently offensive to community standards for broadcast matter," that the dominant theme was clearly an appeal to prurient interest because the announcer coaxed responses that were designed to arouse sexual feelings, and that there was no redeeming social value because this was not a serious discussion of sexual matters, "but rather titillating, pandering exploitation of sexual materials."

The Commission said that as in the 1970 *WUHY–FM* case (the licensee was assessed a $100 forfeiture for indecent programing because of an interviewer's use of various "patently offensive" words) there is an alternative ground for action. Pointing out that in *WUHY–FM* its construction of the term "indecent" as used in 18 U.S.C. 1464, constituted a different standard from "obscene" in the broadcast field, the Commission found that even if the "Femme Forum" material did not appeal to a prurient interest, it warrants the assessment of a forfeiture because it is within the statutory prohibition against the broadcast of indecent matter.

The Commission said as in *WUHY–FM* it had a duty to act to prevent the erosion of the country's broadcast system. It said that the $2,000 forfeiture is appropriate for willful or repeated violations, and while there has been no judicial consideration of obscenity or indecency in this specific broadcast situation "we are not fashioning any new theory here."

The Commission said that it is not its function to impose upon broadcasters and listeners its personal standards of good taste, but neither is it its function to ignore the presentation of programing

that violates a criminal statute. "To shirk our responsibility would be to ignore the clear statutory mandate of Congress and to drastically curtail the usefulness of radio for millions of people," the Commission declared.

The Commission said that it recognized that "we are not the final arbiters" in this sensitive field, therefore, "we welcome and urge judicial consideration of our action."

Sonderling has 30 days to either pay or contest the forfeiture.

In a dissenting statement, Commissioner Nicholas Johnson contended that the majority of the Commission was engaging in a form of censorship "by penalizing a station because of the content of one of its programs." He said that this conduct was "arbitrary . . . unwise . . . and unconstitutional."

Noting that he found portions of the programs transcribed in the Commission's opinion "extremely distasteful," Commissioner Johnson pointed out that he had refused to join in a tape monitoring session because he did not believe the Commission "should sit as a program review committee—imposing its tastes upon both broadcasters and the American public." He said the only issue for him, as a government official, was freedom of speech.

Commissioner Johnson noted the difficulties involved in defining "obscenity" and "indecency." Reviewing court cases on the subject, he argued that the majority failed to apply properly the legal standards of previous court rulings. He said that courts, not administrative agencies, should act in matters where a determination must be made between "social demands and the individual's most precious right to free expression."

Commissioner Johnson concluded that "only the Justice Department should be allowed to initiate proceedings of this nature, and only the courts should be allowed to resolve the ultimate question whether a given program is or is not protected by the First Amendment.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

During my seven years at the Federal Communications Commission, I have repeatedly urged my colleagues to impose limited affirmative programming responsibilities on the commercial broadcasting industry. The "fairness doctrine," for example, demands that broadcasters present all sides of controversial issues of public importance. *See, e.g.*, my dissent to *Chevron Remand: Fairness Doctrine Ruling*, 37 F.C.C. 2d 528 at 533 (1972). I have argued that the broadcasting industry's policy of refusing access both to members of the public and to their elected representatives contravenes both the public interest and the Constitution. *See, e.g.*, my dissents to *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 at 299 (1970), *rev'd*, 450 F. 2d 642 (D.C. Cir. 1971), and *Availabiilty of Network Programming Time to Members of Congress*, F.C.C. 72-1194, — F.C.C. 2d — (1972). And I have urged my colleagues to inject minimum precision into the statutory requirement that broadcasters serve the "public interest, convenience or necessity" by demanding that these broadcast-

ers present a minimum amount of news and public affairs programming. *See, e.g., Oklahoma Renewals*, 14 F.C.C. 2d 1 (1968).

The F.C.C. majority has steadfastly declined to impose such affirmative programming obligations upon the commercial broadcasting industry, contending that such requirements would approach censorship and preferring, instead, to leave programming decisions to the broadcaster's "discretion."

Though I have argued that this Commission should impose affirmative programming obligations upon broadcasters—obligations of the sort upheld by the Supreme Court in the face of Constitutional attack, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 376 (1969)—I have never urged my colleagues to engage in program censorship, to outlaw specific kinds of programming. For, whereas affirmative obligations tend to enhance the public interest by fostering program diversity and coverage of all sides of controversial issues, *see Red Lion, supra*, negative sanctions in the form of outright programming bans only tend to reduce such diversity, thus raising the very specter of censorship which the F.C.C. majority has always claimed to fear.

Today, that majority engages in precisely this form of censorship by penalizing a station because of the content of one of its programs. The majority's conduct is not merely arbitrary and unwise as a matter of public policy; I believe it also to be unconstitutional. I dissent.

Station WGLD–FM, Oak Park, Illinois, broadcasts a talk show called "Femme Forum"—a program wherein an announcer talks over the telephone with women callers about a variety of subjects, including sex. Prior to its decision to issue a Notice of Apparent Liability Against Sonderling Broadcasting Co., WGLD's licensee, the F.C.C. majority listened, in closed session, to a tape of selected excerpts from these talk shows, I declined to participate in that monitoring session because, as I shall explain, I do not believe that this Commission should sit as a program review committee—imposing its tastes upon both broadcasters and the American public. I personally find those portions of the tape which are repeated in the majority's opinion to be extremely distasteful. I would not engage in such conversation privately or publicly, let alone over a radio station. Were I a station manager I would endeavor to keep it off the air. But those are not the choices or roles before me. The only issue before me is whether I should use my position as a U.S. Government official to bring the full power of that government to bear to "make a law abridging the freedom of speech"—to borrow from the language of the Constitution's First Amendment.

The majority holds, in essence, that the program segments of "Femme Forum" they have taken out of context are obscene. Even if not obscene, adds the Commission, the programming is "indecent." In what appears to be a subtle effort to pass the buck, the majority contends that Congress, through the Communications Act of 1934, has directed the Commission to impose fines upon broadcasters who have engaged in obscene or indecent programming. Whether the Communications Act demands that the F.C.C. act as it has today is not clear. If that statute does so empower and direct the F.C.C., then the Constitutional infirmities inherent in today's decision are attrib-

utable to both the Congress and the Commission. That Congress must share the blame for today's decision is made more clear by the fact that the Commission majority very probably would not have acted as it has absent severe Congressional pressure to do something in this area.

My difficulties with the majority's reasoning are many.

First, though "obscene" expression is not protected by the First Amendment, *see Roth v. United States*, 354 U.S. 476 (1957), expression which falls outside the obscenity category is, except in rare cases which I shall discuss, not subject to governmental regulation. The majority admits that "indecent" expression is something less than obscenity, yet the majority nevertheless asserts that it may outlaw indecent expression.

Aside from constituting a blatant attempt to regulate expression which is protected by the First Amendment, the majority's approach poses additional problems because nowhere does the majority come forth with a precise definition of its concept of "indecency." The majority asserts, rather, that indecent programming is programming that meets all the indicia of obscene programming except that it need not appeal to the prurient interest. The "definition" of obscenity is, itself, very vague and *ad hoc*. And if obscenity is so vaguely defined, then the "indecency" varient promulgated by the majority is a hopeless blur.

In such circumstances, broadcasters, perforce kept in the dark as to the types of programs they can and cannot broadcast, will obviously steer as wide of the "indecency" mark as possible, declining to carry programming which might meet the majority's amorphous "test" as well as programming which is obviously protected by the Constitution. In short, the vagueness problem inherent in the majority's approach is accompanied, as it always is in the First Amendment area, by the vice of unconstitutional overbreadth. *See, e.g.*, my dissenting statement in *WUHY-FM*, 24 F.C.C. 2d 408 at 422 (1970); *see also* Note, *Conspiracy and the First Amendment*, 79 Yale L.J. 872 at 884–886 (1970).

Second, the majority holds that while "Femme Forum" involved indecent programming, it also involved obscene programming—programming which the majority believes to be clearly beyond the protections afforded by the First Amendment. There are numerous problems with this aspect of the majority's opinion.

The majority claims to define "obscenity" in the manner set forth by the Supreme Court in *Roth*, *supra*, and *Ginzburg v. United States*, 383 U.S. 463 (1966). The majority then suggests that this definition must somehow be molded to meet the peculiar nature of the broadcasting medium. In effect, the majority appears to argue that expression which would not be considered obscene if contained in a book becomes obscene on television or radio because of the "obtrusive" nature of the medium. The majority thus presents broadcasters with a "continuum definition" of obscenity; with this approach I cannot agree.

If there exists a definable category of expression called "obscenity," that category does not expand as the medium through which it is communicated changes. While the Supreme Court has suggested that some

forms of sexually explicit, but non-obscene, expression might be subject to regulation if that expression should assault an individual's rights to privacy, *see, e.g., Redrup v. New York*, 386 U.S. 757 (1967); *Cohen v. California*, 403 U.S. 15 (19), the Court has also made clear that such privacy rights are not "assaulted" unless the expression is communicated in a manner "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup*, *supra* at 769. First Amendment rights may not be abridged, then, simply because some persons may find offensive forms of expression which they could readily avoid.

On this theory, assuming for the moment that the F.C.C. should be engaged in this sort of programming regulation at all, sexually explicit, but nevertheless non-obscene material could be regulated only if the broadcast medium makes it impossible for an unwilling individual to avoid exposure to the particular expression. That is not the case when the offending speech is contained in a single, clearly identified program which may be accepted or avoided in its entirety.

I believe the F.C.C. has no business regulating non-obscene material. I see great dangers in allowing this Commission to regulate even material which might properly be deemed "obscene." But in this instance the majority even failed properly to apply the *Roth* test to the facts before us, and thus erred in concluding that the instant programming material was obscene. *Roth* demands, *inter alia*, that the expression, *taken as a whole*, be patently offensive by contemporary community standards. In the instant case, the majority focuses only on portions of the challenged program, makes absolutely *no* attempt to delineate the relevant "community" in question, and makes *no* effort whatsoever to determine the nature of the relevant community's standards. As a result, it seems rather bizarre for the majority to conclude that the "Femme Forum," taken as a whole, is patently offensive to an undefined community with unknown standards when it knows nothing of (1) the whole program, (2) the community, or (3) its standards.

And, indeed, such a conclusion becomes even more remarkable given the fact that WGLD–FM's "Femme Forum" has, according to at least one television columnist, become the top rated radio program in the Chicago area. *See* Clarence Petersen's column in the *Chicago Tribune*, March 12, 1973. Though a growing number of citizens are obviously not offended by this sort of programming, the F.C.C. majority has apparently determined that they ought to be.

Surprisingly, Mr. Petersen reports that far from appealing to anybody's prurient interests, "Femme Forum" presents "lots of banal nonsense, lots of common sense, most of it so common as to be a bore." Mr. Petersen adds: "At times Moore [the show's announcer], former record promoter and disk jockey, asked challenging questions. At other times his questions indicated that he had not even been paying attention to what the women were saying. I suspect that even he was getting

bored from time to time." And so it appears that the F.C.C. majority has vented its spleen not against "titillating" (their favorite term) sexual material capable of arousing one's prurient interest, but, rather, against mundane—even bland—discussions that might offend some, strike others as bizarre, but which clearly appeal to a growing audience of listeners who are, I suppose, curious.

"We feel it went beyond community standards of describing sex, nudity and the like; I suppose you might say it appealed to our prurient interest and it was definitely without redeeming social value. We liked it."

41 F.C.C. 2d

Finally, while I do not believe that the F.C.C. may, constitutionally, censor non-obscene expression, and while the majority could not properly conclude on the record before it that the instant expression was obscene, I also have great doubts about whether this Commission should take action even in a case where programming might be termed obscene under the appropriate Constitutional test.

Because the term "obscenity" is so elusive, so incapable of precise delineation, and because governmental regulation of so amorphous a category of expression creates a tension between social demands and the individual's most precious right to free expression, I believe the courts—and not administrative agencies—are more competent to determine whether particular forms of expression fall within the unprotected category. While I certainly do not condone programming such as that before us, I am nevertheless extremely reluctant to use my power as a federal official to impose my tastes upon anyone, let alone upon an entire nation. The F.C.C. majority, however, does not entertain such hesitations, preferring instead to sit as an omniscient programming review board, allegedly capable of deciding what is and is not good for the American public to see and hear.

The dangers in such an approach are obvious. But they are amplified ten-fold when the F.C.C.—the agency which possesses the power to grant and deny all broadcast licenses—plays the Big Brother role. For it seems patently clear that any F.C.C. pronouncement against a particular kind of programming will cast a pall over the entire broadcasting industry—not so much because these broadcasters fear the imposition of fines, but, rather, because they fear the potential loss of their highly profitable broadcast licenses. As a result, F.C.C. regulation of obscenity is dangerous not only because this agency is, as the instant case painfully reveals, incompetent to deal properly with the problem, but also because such regulation creates a "chilling effect" of enormous proportions on all forms of broadcast expression.

In a real sense, then, F.C.C. regulation in this area is akin to the imposition of prior restraints on expression absent the sorts of judicial scrutiny and due process protections which the Supreme Court has held to be necessary in this highly sensitive area. *See, e.g., Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). In my view, only the Justice Department should be allowed to initiate proceedings of this nature, and only the courts should be allowed to resolve the ultimate question whether a given program is or is not protected by the First Amendment.

Under the majority's approach, however, a judicial determination will become necessary only if Sonderling appeals. In the meantime, extensive damage will have already been done to the First Amendment. F.C.C. action in this area should be preceded, and not followed, by judicial review. For it is, after all, the courts which have enunciated the "obscenity" doctrine, it is the courts which are most competent to apply that particularly judicial doctrine, and the F.C.C., as today's decision reveals so well, is in no way comparable to a court.

I dissent.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In this action, the Commission has determined to assess a statutory forfeiture against a broadcaster on the basis of its transmission of sex-oriented talk shows about which this agency has received an onslaught of complaints. My concurrence is short and obvious.

The precarious balance between First Amendment rights and legitimate governmental review of expression in the public interest rests on a finely honed fulcrum. The preponderant Constitutional tilt towards the widest possible liberty in this area is weighted by nothing less than the strength of freedom.

But, freedom of speech is a multi-edged sword. Brandishing *its* right to voice grievances, the public—the real proprietor of the national airwaves—and the public's elected representatives have vociferously spoken out to this Commission against broadcast programming which it considers disgraceful, of little speech value, and wasteful of the limited radio spectrum. Indeed, contingent on a definitive court interpretation, the matter complained of could be in conflict with the federal statute prohibiting the broadcast of obscene and indecent material. (18 U.S.C. § 1464) As public servants, the Commission, while cognizant and rueful of any stigma of censorship, has a legal and moral obligation to be responsive to the causes of public outcry and a duty to act to the extent permitted by law.

Mindful of all of these circumstances, yet distressed by the nature of the subject with which we deal, I find justifiable the limited action taken here for the reasons amply set forth in the majority opinion.[1]

[1] Letter to Sonderling Broadcasting Corporation, —— FCC 2d ——, (FCC 73-401, April 11, 1973).

F.C.C. 73-646

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
SOUTHERN MEDIA COALITION, NEW ORLEANS, LA.
For an Extension of Time To File Petitions To Deny

JUNE 7, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

ALVIN O. CHAMBLISS,
Attorney at Law, Southern Media Coalition, 301 Executive House, 348 Baronne Street, New Orleans, La.

DEAR MR. CHAMBLISS: This is in reference to your letter on behalf of the Southern Media Coalition (Coalition) whereby you request a thirty-day extension of time to file petitions to deny against certain Louisiana and Mississippi radio and television stations.

It appears that your request is directed to the license renewal applications for the following radio and television stations: Stations KVOL, KATC-TV and KLFY-TV, Lafayette, Louisiana; Stations WBRZ-TV, WAFB-TV and WRBT-TV, Baton Rouge, Louisiana; Stations WJTV-TV and WAPT-TV, Jasckon, Mississippi; Station WDAM-TV, Hattiesburg, Mississippi; Station WELZ, Belzoni, Mississippi; and Station WXTN, Lexington, Mississippi.

Section 1.580(i) of the Commission's rules provides, in substance, that a petition to deny a license renewal application must be filed on or before the first day of the last full month of the station's license term. Licenses for broadcast stations located in Louisiana and Mississippi expired on June 1, 1973. Accordingly, a timely filed petition to deny was due on May 1, 1973, the date you filed your letter with the Commission. Absent good cause shown, the Commission will not grant a waiver of Rule 1.580(i) to authorize the filing of a petition to deny after that date. See, *e.g.*, *WSM, Incorporated*, 24 FCC 2d 561 (1970) and *Trumbull County N.A.A.C.P.*, 25 FCC 2d 827 (1970).

In support of your request, you contend that many of the license renewal applications were not on file on March 1, 1973; that some were several days to almost a month late; and that due process and equal protection requires the same treatment for licensees and community groups seeking to challenge their renewals. You further submit that the public interest would be advanced by extending the time for filing petitions to deny the aforenoted renewal applications until June 1, 1973.

The Commission is of the opinion that the Coalition has failed to set forth sufficient reasons justifying the requested extension of time. There has been no attempt either to describe the Coalition's efforts to locally inspect the aforenoted renewal applications or to identify those stations whose license renewal applications were not timely available for public inspection by the deadline established by Rule 1.539(a). In this regard it should be pointed out that license renewal applications for Louisiana and Mississippi stations were required to be filed with the Commission no later than March 5, 1973. Our records reflect that with the exception of Stations WXTN and WELZ, all of the aforenoted stations timely submitted their license renewal applications to the Commission. In the absence of a showing that these timely filed applications were not locally available for public inspection by March 5, 1973, the Commission will not waive Section 1.580 (i) of the Rules. Compare Letter to *Council on Radio and Television*, FCC 71–1088, 23 RR 2d 185, released October 21, 1971.

Homes County Broadcasting Company, the licensee of Station WXTN, filed its license renewal application with the Commission on March 6, 1973, whereas Humphreys County Broadcasting Company, Inc., the licensee of Station WELZ, did not submit its license renewal application until March 8, 1973. On March 27, 1973 and April 10, 1973, the Commission publicly announced its acceptance of the late-filed applications for Station WELZ and Station WXTN, respectively. Pursuant to Rule 1.516(e)(1), the time for filing a petition to deny was extended to May 29, 1973 with respect to Station WELZ and to June 11, 1973 with respect to Station WXTN. Therefore, your request is moot with respect to Station WXTN. Although the extended deadline for formally protesting the license renewal application for Station WELZ has passed, it is not alleged that that application was not available for public inspection during the sixty-two days following the Commission's acceptance of that late-filed application. Accordingly, good cause has not been shown for waiving the Commission's rules and extending the May 29, 1973 deadline for formally protesting the WELZ renewal applications. See *International Panorama TV, Inc.*, 32 FCC 2d 718 (1971). Our action, of course, is without prejudice to the Coalition's right to informally protest the license renewal applications for the aforenoted stations.[1] See Rule 1.587.

In view of the above, IT IS ORDERED, That the request of Alvin O. Chambliss, on behalf of the Southern Media Coalition IS DENIED.

Commissioner Nicholas Johnson dissenting. Commissioner Benjamin L. Hooks dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

[1] On June 1, 1973, the Coalition filed petitions to deny the license renewal applications for Stations WAPT–TV and WDAM–TV. Similarly, on June 6, 1973 a petition to deny was directed against the license renewal applications for Stations WAFB–TV, WBRZ–TV and WRBT–TV. In accordance with our action herein, these petitions will be treated as informal objections.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

The Southern Media Coalition (SMC), by its attorney, requested a 30-day extension of time in which to file Petitions to Deny the license renewals of several southern broadcast stations.[1] The Commission has arbitrarily denied that request, adding insult to injury by the discourteous manner in which this action was taken.

Actions on motions for extensions of time are wholly discretionary on the part of the party taking the action and to put it charitably, our customary attitude with respect to such requests is liberal to a fault.[2] In the instant matter, the community groups, whose participation the Commission claims to encourage,[3] requested additional time for the following reasons. First, SMC alleges that it had been negotiating with a number of stations directly prior to their license renewals filings, had been assured by the licensees of acquiescence in any extension of time requests filed by the groups should the negotiations prove unsatisfactory, and that several of the stations—with less than a week's notice—broke off negotiations and filed for renewal in violation with the asserted rapprochment with the community groups. In other words, the community groups are alleging a breach of faith between the broadcasters and their local constituencies and deceptive conduct specifically intended to create a false sense of security right up to the deadline for timely-filed Petitions to Deny.

As if the lack of *bona fides* alleged by requestants would not be sufficient justification to grant the extension,[4] other assertions of good cause are urged. The phasing out of OEO and supported social service programs disrupted the efforts of the community groups to get funding for their projects is stated as a second reason. Third, SMC points out that during the months of March and April of this year, at a time when negotiations between the groups and pleading preparation would have been underway, the states of Mississippi and Louisiana were being devastated by rains, floods and tornados leaving huge areas of those states a shambles in the wake of one of the worst natural disasters ever to strike this country, leaving many of the members of the

[1] The stations named were: KVOL, KATC–TV, KLFY–TV, Lafayette, La., WBRZ–TV, WAFB–TV and WRBT–TV, Baton Rouge, La., WJTV–TV; and WAPT–TV, Jackson, Miss., WDAM–TV, Hattiesburg, Miss., WELZ, Belzoni, Miss., and WXTN, Lexington, Mississippi.

[2] For example: The Office of Administrative Law Judge last year granted approximately 409 out of 420 extension of time motions (including motions for continuance of hearing dates); The Review Board in calendar year 1972 granted over 90% of the 169 motions for extension of time filed with it. Although no formal compilation is available, other bureaus and offices within the Commission report a similar or higher percentage of grants.

[3] Recently, the Commission stated: ". . . we are hopeful that the manual . . . (Broadcast Procedural Manual) will encourage participation by members of the community and that it will direct such participation along lines which are most effective and helpful to the Commission . . . The purpose of this manual is to outline procedures available to the concerned and to provide information and practical advice concerning their use . . . ". "The Public and Broadcasting—Procedural Manual", 37 Fed. Reg. 20510 (Sept. 29, 1972) 37 F.C.C. 2d 286, 287 (1972).

[4] As far as I know, the Commission has not even inquired of the relevant licensee as to the efficacy of SMC's claim of duplicity. This, at a time when the Commission contends it is attempting to foster more community dialogue. See, for example, *Interim Report and Order*, "In the Matter of Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses", Docket No. 19153 (FCC–73–451, released May 4, 1973) wherein the Commission—recognizing the need for additional time to peruse license applications—has extended from 90 days to 4 months (i.e., 30 additional days) the period between the filing of renewal applications and the renewal date. Thus, the Commission herein refuses to give SMC the 30 additional days it intends to give by rule to all prospective license renewal opponents.

community groups distraught and homeless.[5] If the allegations of an act of God, an historical legal argument, and a Presidential Declaration of Disaster to support the claim, is not good cause for a short extension of time, it will be interesting to see just what the Commission considers sufficient grounds in the future when dealing with the requests of other parties.

One would think, given the above recitation of reasons (and particularly those relating to the tragic disaster), any government agency would waive mere technical rules of procedure in order to find out why and what information is in the possession of citizens—paralyzed with personal and financial misfortune—begging to be heard by the government. If these uncompensated citizens can take the time, in spite of all adversity, to concern themselves with the public interest (or lack thereof) activities of Commission licensees, why can't the Commission follow its usual precedent on items of time requests in order to hear what these intrepid citizens have to say? Is it because the Commission doesn't believe that requestants have anything important to say; or rather as some maintain, that the Commission intends to ram through license renewals, come Hades or high water.

Finally, we come to the most disconcerting factor. While the Commission dismissed SMC's valid pleas, presumably justifying such action on the basis of orderly dispatch of administrative business, it's opinion tactfully overlooks the fact that its own dilatory actions exacerbated SMC's time shortage. To explain, anyone familiar with bureaucratic orthodoxies, and certainly those familiar with elementary rules of correspondence, cannot fail to be placed on guard when the first sentence of the majority's denial letter conspicuously omits the date of SMC's request letter. That is because, the request for extension of time is dated April 28, 1973, and was mailed Special Delivery to the Commission. It certainly is embarrassing, to say the very least, that the Commission did not bother to act on the request until June 7, 1973, a period of over 30 days from its receipt. At the same time the Commission—when it got around to it—refused a 30-day grace period to SMC. Had the Commission acted expeditiously (as it expected SMC to do), it could have advised SMC almost a month ago that the time for filing Petitions to Deny had been extended, because of late filings on the part of the applicants, until May 29, 1973 (in the case of WELZ) and until June 11, 1973 (in the case of WXTN). In other words, in the cases of those two stations, SMC could have filed its Petitions without the necessity of a 30-day extension. But the Commission waited until June 7, 1973, to deny the extension request, leaving the requestant in worse shape—timewise—than before it had filed its request. Now, of course, it is all but impossible for SMC to do formally anything, at least for this license period.[6]

Accordingly, I dissent.

[5] As detailed by the Office of Emergency Preparedness, which is authorized to survey and provide assistance to those areas of the country encountering catastrophe, the raging flood waters of the Mississippi were of such magnitude that the President of the United States declared the states of Mississippi and Louisiana, as National Disaster Areas; particularly hard hit, according to OEP, were the areas of East and West Baton Rouge Parish and St. Martin Parish (the location of stations WBRZ–TV, WAFB–TV, WRBT–TV and KVOL, KATC–TV, and KLFY–TV. See, Miss. OEP–368–DR. March 27, 1973; La., OEP–374–DR, April 27, 1973, issued by the Office of Emergency Preparedness.

[6] While the Commission has indicated that it will regard SMC's filings as informal complaints, it denys these groups the legal status of a party under Section 309(d) of the Communications Act with attendant procedural rights.

F.C.C. 73-656

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ALL COMMUNICATIONS COMMON CARRIERS SUBJECT TO THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION—STABILIZATION OF RATES AND CHARGES FOR INTERSTATE AND FOREIGN COMMUNICATIONS SERVICES

ORDER

(Adopted June 15, 1973; Released June 15, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it Executive Order No. 11723 issued June 13, 1973 providing for the stabilization of prices for a 60-day period. This Executive Order is applicable to the rates and charges of all communications common carriers subject to the jurisdiction of this Commission providing interstate and foreign communications services. In order to implement this Executive Order, which is designed to insure stabilization of the economy, the Commission finds it is essential that the rates and charges for interstate and international communications services be maintained at levels no higher than those in effect during the period June 1 to June 8, 1973.

2. Accordingly, it is ordered, That common carriers subject to the jurisdiction of this Commission:

(a) May not during such 60-day period charge, demand, collect or receive any compensation for the provision of interstate or foreign communications services greater than the highest rate or charge for any such or like communications services in effect for the period June 1 to June 8, 1973, either by filing new tariff schedules to become effective during such 60-day period, or by allowing already effective tariffs to expire during such 60-day period;

(b) Shall promptly withdraw any tariff now on file and scheduled to be effective after June 13, 1973, which provides for a charge or rate higher than that in effect for the period June 1 to June 8, 1973, for the same or a like service, or postpone the effective date of such tariff until after the expiration of the 60-day period specified in Executive Order No. 11723, pursuant to special permission which is hereby granted. Any tariff not so withdrawn or postponed within five days of the issuance of this order shall be deemed rejected and the presently existing tariff provisions purported to be superseded by the rejected tariff shall be deemed reinstated; and

(c) Refund promptly to any user or customer any sums collected subsequent to June 13, 1973, in excess of those permitted by this order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-708

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice to
TAFT BROADCASTING CO., CINCINNATI, OHIO
For Apparent Liability for Forfeiture

JUNE 27, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

TAFT BROADCASTING CO.,
Licensee of Radio Station WDAF,
1906 Highland Avenue,
Cincinnati, Ohio

GENTLEMEN: This letter constitutes a Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

An inquiry into the operation of standard broadcast station WDAF, Kansas City, Missouri, reveals that the station apparently violated Section 73.123(c) of the Commission's Rules when it failed to satisfy the affirmative obligations set forth in the Rules "sufficiently far in advance of the broadcast" of a WDAF editorial presented six times on August 7, 1972, the day before the Missouri primary election.

The inquiry was initiated as the result of a complaint filed by Joseph P. Teasdale, Esq., Jackson County, Missouri, prosecutor, on December 29, 1972. Chief among complainant's allegations was the charge that the following WDAF editorial constituted a statement of opposition to his candidacy for the Democratic Party's nomination for Governor of Missouri:

> In view of Prosecutor Joe Teasdale's current position on marijuana law enforcement, we wonder whether it will be necessary to equip Kansas City police officers with pharmacists' scales.
>
> Teasdale says his staff will prosecute only when a person is found to possess more than 35 grams of the still illegal weed.
>
> If a person is arrested with even less than that amount in that part of Kansas City which lies in Clay County, he can count on facing stiff state charges filed by Clay County's Prosecutor, William Brandon . . . but not so in Jackson County.
>
> In an effort to keep marijuana suspects from going completely free Kansas City police now send them to Municipal Court where even conviction carries a fine of twenty-five dollars.
>
> Clay County Prosecutor Brandon said recently the present Teasdale position on marijuana makes Jackson County a haven for marijuana users.
>
> WDAF thinks so too.

The inquiry further disclosed that the challenged WDAF editorial was presented during each of six of the station's regularly scheduled newscasts on the day before the election and that complainant, who was one of nine candidates for the Gubernatorial nomination, received

no indication or other information from the station prior to the broadcasts indicating that the station intended to broadcast the editorial. Additionally it appears that you failed to provide complainant with a script or tape of the editorial and did not offer complainant an opportunity to respond before the editorial was broadcast. Following the broadcast of the editorial, however, complainant requested and received the opportunity for his designated spokesman to respond to the editorial. This response was broadcast six times on August 8, the day of the election.

Complainant asserts, and you acknowledge, that as Prosecuting Attorney for Jackson County, Missouri, and a candidate for the nomination, his position on the enforcement of Missouri's drug laws had become an issue in the campaign by virtue of the fact that repeated statements pertaining to Mr. Teasdale's marijuana law enforcement policies had been made by Mr. Teasdale and certain of his opponents during the active campaign period. It is also undisputed that this same issue had assumed the dimension of a controversial issue of local public importance prior to that time and that the issue had been aired and debated during a two-year period prior to the Missouri primary election.

You plead the following defenses to complainant's charges: (1) Mr. Teasdale, through his spokesmen, was given an opportunity to respond to the WDAF editorial promptly and without question; (2) while the WDAF editorial was presented six times, Mr. Teasdale's responses were presented twelve times, and that on a line-by-line quantitative comparison "210 lines of text were presented which were supportive of Mr. Teasdale's position . . . and 104 lines were broadcast which were critical"; and (3) the editorial at no time focused on or alluded to Mr. Teasdale's candidacy or the campaign then in progress, but was concerned solely with "the law enforcement issue." You claim that since the station's editorial confronted the narrower matter of Mr. Teasdale's enforcement of the marijuana control laws in his professional capacity as Jackson County, Missouri, Prosecuting Attorney, and since Mr. Teasdale's representatives were given an opportunity to voice their opposition to the views presented in the editorial, it cannot be said that the editorial comment constituted the type of licensee editorial contemplated by Section 73.123(c) of the Commission's Rules. In this regard, however, you include the following statement in your February 9, 1973, response to a Commission letter of inquiry:

> County Prosecutor Teasdale's methods for enforcing Missouri's drug laws insofar as they relate to the possession of marijuana were in themselves controversial as, I believe, the attached material makes clear. [1] They had been controversial for a number of years. Further, through a campaign speech given by Candidate Teasdale on March 20, 1972 . . . and subsequent statements made by him and opposing candidates, additional public interest and concern about the enforcement issue had been created.
>
> WDAF was thus confronted with a substantial substantive issue with both administration of justice *and political implications.* [Id. at 1–2. Emphasis added].

[1] Licensee's February 9 response to the complaint included facsimiles of various newspaper copy which had appeared in St. Louis and Kansas City dailies. These submissions appeared on various dates between March 21 and August 1, 1972, and purported to show that Mr. Teasdale's policies pertaining to the enforcement of Missouri's drug laws had been the subject of a continuing political controversy.

In that response, you further state:

> *WDAF was not, however, unaware of the political significance of the editorial and the reply.* Accordingly, on August 7, it broadcast as a part of its regular hourly news programming, a substantial statement by Joseph Moore, manager of Mr. Teasdale's gubernatorial nomination campaign. This statement was broadcast six times on August 7 . . . (and) dealt specifically with the political aspects of the WDAF substantive issue editorial. [Id. at 2–3. Emphasis added].

You conclude that, taken together, all these factors resulted in a balanced and sensitive treatment of the issue raised and that complainant was given at least a reasonable opportunity to voice his opposition to the station's editorial, even though complainant had not been informed of the broadcasts prior to the station's presentation of the editorial.

The threshold question to determine is whether the August 7 WDAF editorial was the type of licensee commentary contemplated by Section 73.123(c). Although the editorial did not contain any explicit reference to the election or the candidacy of Mr. Teasdale it was broadcast on the day prior to the election. It appears that the editorial commented adversely on a significant issue readily and clearly identified with Mr. Teasdale in his capacities as candidate and Prosecutor, roles which were raised and challenged during the campaign; that you acknowledge that you were aware "of the political significance of the editorial and the reply"; and that under these circumstances such editorial, broadcast the day before the election, can only be considered one opposing his candidacy. Therefore, it appears that the editorial fell within the parameters of a political editorial as the Rule defines those terms, and that you violated Section 73. 123(c) by failing to implement the affirmative duties incumbent upon licensees under the Rule sufficiently far in advance of the six broadcasts involved.

The procedural requirements set forth in Section 73.123(c) are clear.[2] The Rule requires licensees broadcasting such editorial comment within 72 hours prior to the day of the election to transmit to the opposed candidate ". . . (a) notification of the date and time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or spokesman of the candidate to respond over the licensee's facilities . . . sufficiently far in advance of the broadcast to enable the candidate . . . to have a reasonable opportunity to prepare a response and present it in a timely fashion."

Although you apparently permitted Mr. Teasdale's spokesman to respond to the editorial, such response was not broadcast until election day, and Mr. Teasdale contends that "Only when it became too late to have any impact did they allow me to respond." You also contend that in six news programs of August 7 you broadcast a statement by Joseph Moore, Mr. Teasdale's campaign manager, which

[2] Section 73.123(c) reads as follows:
(c) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date and time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or spokesman of the candidate to respond over the licensee's facilities: *Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.* [Emphasis added.]

"dealt specifically with the political aspects of the WDAF substantive issue editorial." None of these actions by you comply with the provisions of Section 73.123(c) concerning editorials broadcast within 72 hours of an election. The clear import of Section 73.123(c) places obligations on a licensee to permit candidates to reply to the specific editorial broadcast by a licensee and to have sufficient time to prepare a response in light of the content of the editorial. You failed to meet these obligations. Mr. Moore's statement was not broadcast in response to the specific editorial, and Mr. Teasdale, the one most affected by the editorial, has stated that the response of his spokesman broadcast on election day was "too late to have any impact."

The intent and thrust of Section 73.123(c) clearly contemplate the conclusions reached herein. The licensee, of course, has the prerogative to broadcast statements endorsing or opposing candidates seeking elected public office. That right in itself is not called into question here and indeed it has been the Commission's position to encourage licensee editorials on political and social controversies. In exercising such judgment, however, licensees' decisions to present this type of programming must be governed by the Commission's Rules and the Act.

We have considered all the matters herein and have determined that, because the WDAF editorial constituted a political editorial falling within the ambit of Section 73.123(c), and because there is no factual dispute that you wholly failed to implement the affirmative mandates of the Rule at any time prior to the broadcast of the editorial on the day before the Missouri primary election, pursuant to Section 503 (b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability of $1,000 for willfully or repeatedly violating Section 73.123(c) of the Commission's Rules.

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $1,000, made payable to the Treasurer of the United States.
2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.
3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

Commissioners Robert E. Lee and H. Rex Lee absent; Commissioner Johnson dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73–723

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Inquiry by TAFT BROADCASTING CO., KANSAS CITY, Mo. Concerning Applications of Intermedia, Inc. and Amaturo Group, Inc. for Assignment of License and Tall Tower	BALCT–491 and BPCT–4473

JULY 3, 1973.

Mr. VICTOR E. FERRALL, Jr.
Koteen & Burt,
1000 Vermont Avenue NW.,
Washington, D.C.

DEAR MR. FERRALL: This refers to your letter of March 13, 1973, filed on behalf of Taft Broadcasting Company, licensee of WDAF–TV, Kansas City, Missouri, concerning the application for assignment of license of KQTV, St. Joseph, Missouri from Intermedia, Inc. to Amaturo Group, Inc. (BALCT–491). The assignor has a pending application for modification of facilities proposing a new tall tower for KQTV (BPCT–4473), and the assignee will prosecute that application on acquiring KQTV. Taft Broadcasting Company and licensees of several other area stations have filed pleadings opposing the tall tower proposal. These pleadings are directed against BPCT–4473 and not against BALCT–491. However, your letter objects to the inclusion in the financial proposal in the assignment application of a statement on the assignee's plans to finance BPCT–4473 by a bank loan which is separate from its proposed financing of the assignment. Because of this showing you express the concern that a grant of the assignment application will constitute a finding that applicant is qualified to acquire, construct and operate both proposals. The rights of Taft and other parties opposing the KQTV tall tower proposal are in no way derogated by the inclusion of this information in the assignment application. As the assignee itself recognizes, a grant of the assignment application only shows that the Commission has found the assignee financially qualified to purchase and operate the station as presently authorized, and the assignee's financial qualifications to construct BPCT–4473 will be examined separately, in connection with that application.

Commissioners Johnson dissenting and H. Rex Lee concurring in the result.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-717

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 64 OF THE COMMISSION'S MISCELLANEOUS RULES RELATING TO COMMON CARRIERS IN ORDER TO GRANDFATHER CABLE TELEVISION SYSTEMS OPERATING IN THE OPERATING AREAS OF AFFILIATED TELEPHONE COMPANIES.	RM 2172

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 10, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it a petition for rulemaking filed on March 29, 1973 (Public Notice April 16, 1973) by Denver and Ephrata Telephone and Telegraph Company, D and E Cable TV, Inc., North Pittsburgh Telephone Company and Clearview Antenna Television Systems, Inc. (hereinafter collectively referred to as "petitioners" and individually as "Denver and Ephrata", "D and E", "North Pittsburgh", and "Clearview", respectively). Petitioners request that our rules prohibiting telephone company affiliation with cable television systems in their telephone operating areas [1] be amended to grandfather affiliated systems in operation before May 1, 1970. Specifically, it is requested that the following new paragraph (c) be added to Section 64.601:

> The provisions of Paragraphs (a) and (b) of this Section shall not apply to CATV service to the viewing public provided through an affiliate owned or controlled by or under common control with a telephone communications common carrier in the service area of said telephone communications common carrier, or to the provisions of channels of communications, pole line, conduit space or other rental arrangements to any entity which is directly or indirectly owned, operated or controlled by or under common control with a telephone communications common carrier for the provision of CATV service to the viewing public in the service area of said telephone common carrier, if such CATV service was being furnished or such channel facilities or arrangements were being used for or in connection with CATV service to the viewing public on or before May 1, 1970 or were duly authorized by the Commission subsequent to that date.

2. Denver and Ephrata is a landline telephone company providing telephone service in a number of communities in Lancaster County,

[1] Sections 63.54 *et seq.* and 64.601 *et seq.*, Docket No. 18509, *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 FCC 2d 307 (1970), reconsideration denied, 22 FCC 2d 746 (1970).

Pennsylvania. D and E is a wholly-owned subsidiary of Denver and Ephrata which provides cable television service within the exchange areas of Denver and Ephrata. D and E owns the distribution facilities used for the rendition of cable television service. North Pittsburgh is a landline telephone company operating in Allegheny and Butler Counties, Pennsylvania. Clearview is a wholly-owned subsidiary of North Pittsburgh and provides cable television service in Freeport, Pennsylvania within the exchange area of Freeport Telegraph and Telephone Company, a wholly-owned subsidiary of North Pittsburgh. Clearview leases the distribution facilities from North Pittsburgh pursuant to a tariff on file with the Commission. Denver and Ephrata and North Pittsburgh are subject to our affiliation rules and must divest themselves of D and E and Clearview, respectively, on or before March 16, 1974 unless a waiver is granted. Under the proposed amendment, the affiliation rules would not apply to petitioners, nor would they apply to any telephone company which has not as yet divested its cable television operations.

3. Comments in support of this petition were received from Pencor Services, Inc. (Pencor) on May 15, 1973 and from Enterprise Telephone Company and its wholly owned subsidiary, Enterprise Television Cable Company, Inc. (Enterprise) on May 16, 1973. Pencor and Enterprise stand in the same position as petitioners in regard to our affiliation rules. Pencor supports the petition without lengthy discussion. Enterprise reiterates many of the arguments raised by petitioners and in addition requests that if the Commission believes all remaining affiliated systems should not be grandfathered then at least those with fewer than 3,500 subscribers should be so exempted.

4. Petitioners cite statistics showing that telephone company affiliated cable television systems comprise only 2% of the total number of systems in operation today and serve only 1% of the total number of subscribers.[2] These percentages were considerably larger, petitioners state, at the time we adopted our rules. The three major independent telephone companies—which petitioners claim were the source of the abuses we sought to prevent—have divested themselves of most of their affiliated cable television systems and the telephone companies which, like petitioners, have not as yet divested themselves of their affiliated cable television systems have, according to petitioners, "an unblemished record" and have not been charged with any anticompetitive conduct. Any attempts by telephone companies to abuse their position now would not be widespread and would be easily dealt with under the powers vested in the Commission. Therefore, retention of the present divestiture requirement is not necessary and would constitute undesirable regulatory "overkill". Enterprise raises the additional argument that the telephone companies affiliated with the remaining small systems retain no competitive advantage vis-a-vis many non-affiliated cable television operators as they can not take advantage of volume

[2] Petitioners state that of 2,916 cable television systems now in operation, 60—with 55,102 subscribers—are affiliated with local telephone companies. A summary review of petitioner's data, however, indicates that it is not completely accurate.

F.C.C. 73-717

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 64 OF THE COMMISSION'S MISCELLANEOUS RULES RELATING TO COMMON CARRIERS IN ORDER TO GRANDFATHER CABLE TELEVISION SYSTEMS OPERATING IN THE OPERATING AREAS OF AFFILIATED TELEPHONE COMPANIES.	RM 2172

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BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it a petition for rulemaking filed on March 29, 1973 (Public Notice April 16, 1973) by Denver and Ephrata Telephone and Telegraph Company, D and E Cable TV, Inc., North Pittsburgh Telephone Company and Clearview Antenna Television Systems, Inc. (hereinafter collectively referred to as "petitioners" and individually as "Denver and Ephrata", "D and E", "North Pittsburgh", and "Clearview", respectively). Petitioners request that our rules prohibiting telephone company affiliation with cable television systems in their telephone operating areas [1] be amended to grandfather affiliated systems in operation before May 1, 1970. Specifically, it is requested that the following new paragraph (c) be added to Section 64.601:

> The provisions of Paragraphs (a) and (b) of this Section shall not apply to CATV service to the viewing public provided through an affiliate owned or controlled by or under common control with a telephone communications common carrier in the service area of said telephone communications common carrier, or to the provisions of channels of communications, pole line, conduit space or other rental arrangements to any entity which is directly or indirectly owned, operated or controlled by or under common control with a telephone communications common carrier for the provision of CATV service to the viewing public in the service area of said telephone common carrier, if such CATV service was being furnished or such channel facilities or arrangements were being used for or in connection with CATV service to the viewing public on or before May 1, 1970 or were duly authorized by the Commission subsequent to that date.

2. Denver and Ephrata is a landline telephone company providing telephone service in a number of communities in Lancaster County,

[1] Sections 63.54 *et seq.* and 64.601 *et seq.*, Docket No. 18509, *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 FCC 2d 307 (1970), reconsideration denied, 22 FCC 2d 746 (1970).

Pennsylvania. D and E is a wholly-owned subsidiary of Denver and Ephrata which provides cable television service within the exchange areas of Denver and Ephrata. D and E owns the distribution facilities used for the rendition of cable television service. North Pittsburgh is a landline telephone company operating in Allegheny and Butler Counties, Pennsylvania. Clearview is a wholly-owned subsidiary of North Pittsburgh and provides cable television service in Freeport, Pennsylvania within the exchange area of Freeport Telegraph and Telephone Company, a wholly-owned subsidiary of North Pittsburgh. Clearview leases the distribution facilities from North Pittsburgh pursuant to a tariff on file with the Commission. Denver and Ephrata and North Pittsburgh are subject to our affiliation rules and must divest themselves of D and E and Clearview, respectively, on or before March 16, 1974 unless a waiver is granted. Under the proposed amendment, the affiliation rules would not apply to petitioners, nor would they apply to any telephone company which has not as yet divested its cable television operations.

3. Comments in support of this petition were received from Pencor Services, Inc. (Pencor) on May 15, 1973 and from Enterprise Telephone Company and its wholly owned subsidiary, Enterprise Television Cable Company, Inc. (Enterprise) on May 16, 1973. Pencor and Enterprise stand in the same position as petitioners in regard to our affiliation rules. Pencor supports the petition without lengthy discussion. Enterprise reiterates many of the arguments raised by petitioners and in addition requests that if the Commission believes all remaining affiliated systems should not be grandfathered then at least those with fewer than 3,500 subscribers should be so exempted.

4. Petitioners cite statistics showing that telephone company affiliated cable television systems comprise only 2% of the total number of systems in operation today and serve only 1% of the total number of subscribers.[2] These percentages were considerably larger, petitioners state, at the time we adopted our rules. The three major independent telephone companies—which petitioners claim were the source of the abuses we sought to prevent—have divested themselves of most of their affiliated cable television systems and the telephone companies which, like petitioners, have not as yet divested themselves of their affiliated cable television systems have, according to petitioners, "an unblemished record" and have not been charged with any anticompetitive conduct. Any attempts by telephone companies to abuse their position now would not be widespread and would be easily dealt with under the powers vested in the Commission. Therefore, retention of the present divestiture requirement is not necessary and would constitute undesirable regulatory "overkill". Enterprise raises the additional argument that the telephone companies affiliated with the remaining small systems retain no competitive advantage vis-a-vis many non-affiliated cable television operators as they can not take advantage of volume

[2] Petitioners state that of 2,916 cable television systems now in operation, 60—with 55,102 subscribers—are affiliated with local telephone companies. A summary review of petitioner's data, however, indicates that it is not completely accurate.

discounts in purchasing and can not spread developmental and common costs over a large number of systems.

5. Petitioners, as well as Enterprise, in asking us to consider grandfathering existing systems at this time, are arguing that there is no need to apply our affiliation rules to small systems affiliated with small telephone companies or to those systems where their affiliated telephone companies have not actually abused a competitively advantageous position. Grandfathering, as well as such exemptions to our rules were suggested in comments submitted in Docket 18509 [3] and we concluded that "there is no justification for including any specific exemptions" from our policy which is "to bar all telephone common carriers from furnishing CATV service to the viewing public in their operating territory." [4] The question before us now, then, is whether petitioners have disclosed sufficient reason to have us reconsider that policy.

6. First, petitioners' reliance on the fact that telephone companies are now affiliated with only 2% of all cable television systems is both misleading and misplaced. When our rules were adopted telephone companies were affiliated with less than 6% of all systems.[5] But in this context, the present figure of 2% is not miniscule. Moreover, our decision to bar telephone company involvement in the retailing of cable television service was not grounded on a consideration of the overall share of the cable television industry controlled by telephone companies. On the contrary, we specifically addressed ourselves in Docket 18509 to the impact of telephone common carrier involvement in the retailing aspects of cable television in the *community* within which it furnishes communications services. We were concerned with the competitively advantageous position of the telephone company in the community it served and were acting to insure against any arbitrary blockage of the "gateway" to the provision of wide-spectrum service in such community. As noted above, relative to the number of communities served by an affiliated system at the time our rules were adopted, a significant number—over one third—continue to be served by an affiliated system. There continues to be the same possibility in these remaining communities that the affiliated telephone company can take advantage of its position to dampen competition in the provision of cable television and wide-spectrum services. It was to insure against this possibility becoming an actuality that our rules in Docket 18509 were promulgated.

7. Secondly, petitioners' assertion that the remaining affiliated systems are, for the most part, small is not compelling. To put petitioners' figures into context; as of January 1, 1972, the average cable television system in the country serviced 2165 subscribers [6] while the average

[3] See 21 FCC 2d 307 at paragraphs 35, 39 and 40.
[4] 21 FCC 2d at 325.
[5] *Television Factbook*, 1970–1971 Edition, Service Volume, p. 66–a. Figure as of March 9, 1970. The percentage of subscribers currently served by affiliated systems is not readily available.
[6] *Television Factbook*, 1972–1973 Edition, Service Volume, p. 75–a. More current composite figures are not available.

telephone company affiliated system served, as of the effective date of petitioners' data, 914 subscribers. These latter are still systems of significance. Moreover small size in itself is not necessarily a crucial factor. A small system today may be an extensive system tomorrow, especially with industry establishing itself outside of the established urban areas and retirement communities rising out of the rural country side. Small systems may be controlled by telephone companies of considerable size and influence. Or a group of small systems might be under the common control of one telephone carrier. For example, the Lincoln Telephone Company is currently affiliated with cable systems in 13 communities, serving 11,277 subscribers. Finally, even if our action in Docket 18509 was directed solely at the major independent carriers, the fact that they are now almost totally out of cable television is not compelling because they could always get back in by acquiring grandfathered systems.

8. Thus neither the fact that a majority of the telephone companies have complied with our rules and have divested themselves of their affiliated cable television systems nor the fact that the remaining affiliated systems are, on the average, somewhat smaller than non-affiliated systems, compels us to reconsider our policy barring all telephone company affiliation with cable television retailing operations. We disagree therefore with petitioners that the reason for our rules no longer exists and find that this petition does not disclose sufficient reason to support the requested amendment to Part 64 of our rules.

9. Petitioners as well as Pencor argue that by granting the petition we will no longer have to consider applications for waiver and thus eliminate a considerable administrative burden. We were, of course, mindful of the burden we were imposing on our staff by requiring that all waivers be handled on a case-by-case basis. However, we decided that in this way we would insure that our policy would be implemented except in those specific cases where implementation would deny a community access to cable television. We expected that an alternative to affiliated systems would be found in substantially all communities within the four year period allowed for accomplishing divestiture. Telephone companies such as petitioners have now had over three years to secure acceptable arrangements for ownership of their affiliated cable television systems so we would expect that if the showing required for waiver can be made, it can be made at this time. Therefore, to insure that our staff has sufficient time to evaluate applications for waiver, we request that all such applications be filed no later than 60 days from release of this order, unless good cause is shown to merit additional time to file.

10. We stress that no application for waiver will be granted unless supported by a satisfactory showing, with appropriate documentation of the efforts made by applicant to divest itself of ownership and control of its cable television service and that its failure to come into compliance with the divestiture requirement is not due to any dereliction on the part of applicant in exploring and pursuing alternative arrange-

ments. Based upon applicant's showing in this respect, we will determine whether the waiver should be granted, and, if so, the terms and duration of any such waiver.

11. Accordingly, for the reasons stated above, the petition of Denver and Ephrata Telephone and Telegraph Company, *et al.*, IS hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-744

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TELEPROMPTER FLORIDA CATV CORP., HAVERHILL, FLA. For Certificate of Compliance	CAC-463, CSR-176 FL205

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1973; Released July 10, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT.

1. On May 22, 1972, TelePrompTer Florida CATV Corp. filed an application (CAC-463) for certificate of compliance for a new cable television system to serve the approximately 950 residents of Haverhill, Florida (in a smaller market). The application proposes carriage of the following television signals: WEAT-TV (ABC), West Palm Beach, Florida; WPTV (NBC), Palm Beach, Florida; WTVJ (CBS), WCKT (NBC), WPLG-TV (ABC), WTHS-TV (Educ.), WPBT (Educ.), and WLTV (Ind.), all Miami, Florida; and WKID (Ind.), Fort Lauderdale, Florida. TelePrompTer's application is opposed by Scripps-Howard Broadcasting Co., licensee of Television Broadcast Station WPTV, Palm Beach, Florida, and TelePrompTer has replied.

2. In its opposition, WPTV alleges that TPT has repeatedly ignored requests by WPTV to eliminate the carriage of WCIX-TV (Ind.) Miami, Florida from its cable systems in the Palm Beach market as being contrary to the Commission's Rules, and has further ignored requests to refrain from requesting carriage of WCIX-TV in those areas where WPTV is entitled to exclusivity protection.

3. WPTV's objection must be denied. TPT does not propose carriage of WCIX-TV on its system at Haverhill; and the opposition is accordingly irrelevant herein. WPTV must direct its allegations towards those applications where carriage of WCIX-TV is proposed or file for special relief for those areas where it is presently being carried.

4. We note, *sua sponte*, that TelePrompTer Florida CATV Corp.'s franchise is not in strict compliance with Section 76.31 of the Commission's Rules. However, we find TPT's franchise, granted February 22, 1971, to be in substantial compliance as follows: (1) TPT states in its application and in an amendment filed September 6, 1972, that grant of the franchise was preceded by a public hearing affording due process in which the legal, financial, character and technical qualifications of the grantee and the adequacy and feasibility of its con-

struction arrangements were considered by the Town Council and the public; (2) the system is completely constructed; (3) the term of the franchise is thirty years;[1] (4) the initial subscriber installation and monthly service rates were considered by the Town Council and the public in a full public hearing. No increases may be made without prior approval of the Town Council. Although not expressly recited in the franchise, TPT in its amendment undertakes to seek any rate increases through an appropriate public proceeding affording due process; (5) the grantee must maintain an office in the vicinity which shall be open during all usual business hours, have a listed telephone, and be so operated that complaints and requests for repairs may be received and promptly investigated and acted upon; (6) in its amendment TPT undertakes to comply immediately with any modifications of Section 76.31 of the Commission's Rules insofar as they are not inconsistent with its franchise, and if inconsistent to apply to the franchising authority so as to secure within one year of adoption of the modification or upon renewal of the franchise, whichever occurs first, a modification of its franchise consistent with Section 76.31; (7) the annual franchise fee is five percent of gross annual subscriber revenues derived from monthly service charges. Accordingly, we will certify the application until March 31, 1977, pursuant to *CATV of Rockford*, FCC 72–1005, 38 FCC 2d 10. After this date, strict compliance will be required.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition of Scripps-Howard Broadcasting Company (WPTV)" filed July 12, 1972, IS DENIED.

IT IS FURTHER ORDERED, That TelePrompTer Florida CATV Corporation's Application for Certification (CAC–463) IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[1] Although this franchise duration far exceeds the 15-year standard in our Rules, we accept this term as being substantially compliant because our grant extends only until March 31, 1977.

F.C.C. 73-667

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
TELEVISION COMMUNICATIONS CORP., GREENVILLE COUNTY, S.C.	CAC-1738 SC 044
PICKENS COUNTY, S.C.	CAC-1739 SC 045
SPARTANBURG COUNTY, S.C.	CAC-1740 SC 046
TELECABLE OF SPARTANBURG, INC., SPARTANBURG COUNTY, S.C.	CAC-1741 SC 047
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 27, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission has received several applications which propose to offer cable television service in the unincorporated areas of South Carolina counties. The above-captioned applications are unopposed, and involve systems which wish to operate within the Greenville-Spartanburg-Anderson, South Carolina-Asheville, North Carolina television market (#46). As a consequence, the access requirements of Section 76.251 of the Commission's Rules and the relevant signal carriage rules must be fulfilled. Television Communications Corporation ("TVC") intends to carry the following signals in Greenville County, Spartanburg County and Pickens County, South Carolina:

WAIM-TV (ABC/CBS), Anderson, S.C.
WLOS-TV (ABC), Greenville, S.C.
WFBC-TV (NBC), Greenville, S.C.
WSPA-TV (CBS), Greenville, S.C.
WGGS-TV (Ind.), Greenville, S.C.
WNTV (ETV), Greenville, S.C.
WUNF-TV (ETV), Asheville, N.C.
WANC-TV (NBC), Asheville, N.C.
WRET-TV (Ind.), Charlotte, N.C.
WTCG-TV (Ind.), Atlanta, Ga.

In addition, TVC will also carry WBTV (NBC), Charlotte, North Carolina, on its Spartanburg County system. Telecable of Spartanburg, Inc—which also proposes to serve Spartanburg County—will offer essentially the same set of signals:

WAIM-TV (ABC/CBS), Anderson, S.C.
WLOS-TV (ABC), Greenville, S.C.

WFBC–TV (NBC), Greenville, S.C.
WSPA–TV (CBS), Greenville, S.C.
WGGS–TV (Ind.), Greenville, S.C.
WNTV (ETV), Greenville, S.C.
WANC–TV (NBC), Asheville, N.C.
WRET–TV (Ind.), Charlotte, N.C.
WBTV (CBS), Charlotte, N.C.
WTCG–TV (Ind.), Atlanta, Ga.

Carriage of these signals is consistent with Section 76.61 of the Rules.

2. The applicants propose to construct systems with a capacity of at least twenty channels, with separate public, educational and local government channels available on each system; however, no franchises have been submitted because no franchising authority exists for the unincorporated areas of South Carolina counties. The Office of the Attorney General, State of South Carolina, has rendered several advisory opinions to the effect that the County Councils of South Carolina do not possess statutory authority to issue cable television franchises. In a letter to the Cable Television Bureau dated April 30, 1973, Mr. Joseph C. Coleman, Deputy Attorney General of the state, affirmed those earlier opinions.[1]

3. As a substitute for formally authorized franchises, the applicants propose to operate their systems in adherence to the applicable provisions of Section 76.31 of the Rules: significant construction will be accomplished within one year; initial subscriber rates will be comparable to those of neighboring cable systems and will not be raised without full notice or a public hearing; procedures will be established to resolve subscriber complaints; a local business office will be maintained; and any subsequent modification of Commission franchise standards will be observed.

4. We believe the applicants have submitted "acceptable alternative proposal[s]" [2] which assure compliance with the substance of Section 76.31 of the Rules. Therefore, these applicants will be granted until March 31, 1977, subject to the same conditions we have imposed in other, similar cases: [3] (a) these grants are subject to compliance with any further conditions the Commission may order as the result of proceedings intended to resolve the problems inherent in this vacuum of regulatory authority; or (b) as the result of further orders specifically directed to this case should additional matters be brought to our attention which warrant such action in the public interest. However, the reservations we expressed in *Coastal Cable, Inc.*, FCC 73–631, —— FCC 2d ——, apply with equal force here. The absence of a local franchising authority to oversee the day-to-day operations of a cable television system is at odds with our intent to foster a part-

[1] It should be noted here that a recently-enacted law empowering one South Carolina county (Richland County) to issue cable television franchises was ruled unconstitutional by the Court of Common Pleas, Richland County, South Carolina. This decision is currently on appeal to the state Supreme Court, but its final disposition appears to have no bearing on the acknowledged lack of authority to issue franchises in counties represented by the applications under review.

[2] Par. 116, *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366.

[3] E.g., *Mahoning Valley Cablevision, Inc.*, FCC 73–347, —— FCC 2d ——.

nership with local governments in the regulation of a medium of communication, the dimensions of whose development are even now only dimly perceived. Until the states invest appropriate local bodies of government with the authority to issue franchises consistent with the provisions of Section 76.31 of the Rules, the Commission will be forced to assume regulatory responsibilities far more suited to local government; i.e., passing on the wisdom of proposed subscriber rates, procedures to process service complaints, franchise duration, and the like. Again, we urge the states to act promptly to rectify this situation by the enactment of appropriate legislative or constitutional measures.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for a Certificate of Compliance (CAC–1738), filed December 15, 1972, by Television Communications Corporation, Greenville County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the application for a Certificate of Compliance (CAC–1739), filed December 15, 1972, by Television Communications Corporation, Pickens County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the application for a Certificate of Compliance (CAC–1740), filed December 15, 1972, by Television Communications Corporation, Spartanburg County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the application for a Certificate of Compliance (CAC–1741), filed December 18, 1972, by Telecable of Spartanburg, Inc., Spartanburg County, South Carolina, IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–720

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WILLIAM K. ALEXANDER ET AL., TRANSFEROR and MORTENSON BROADCASTING, INC., TRANSFEREE For Transfer of Control of Woodander Broadcasting Co., Inc.	BTC–7074

JULY 3, 1973.

Mr. and Mrs. RICHARD HOLT,
Big Sink Pike,
Route 1,
Versailles, Ky.

DEAR MR. AND MRS. HOLT: This refers to your letter concerning the application for transfer of control of Woodander Broadcasting Company, Inc., licensee of WWLV(FM), Versailles, Kentucky, from William K. Alexander, et al., to Mortenson Broadcasting, Inc. (BTC–7074) and the assignee's proposed change of entertainment format.

You note that whereas the assignor's format consisted mainly of standard pops and country and western music with a late night program of progressive rock music, the assignee proposes a 100% religious format. In this particular case the proposed change of format does not require a hearing on the application. The assignor, using its present format, has sustained substantial operating losses. The station, which is the only one licensed to Versailles, is now silent, due to these losses, and therefore is providing no entertainment programming and no community service. In view of the above, the format change, considering the circumstances of the case, has been determined by the Commission to be consistent with the most recent ruling of the Court of Appeals on the question of change of program format in *Citizens Committee to Keep Progressive Rock* v. *FCC*, (No. 72–1675, D.C. Cir., May 4, 1973). You also state that the assignor carried local news, announcements, and sports, and fear that the assignee will neglect these local interests of Versailles. The assignee proposes a total of seven hours of news per week, of which 25% is to be local and regional news. The assignee will also broadcast 25 minutes per week of announcements on behalf of local organizations and will carry football and basketball games of Versailles High School in season.

In light of the above, the Commission granted the application today. Commissioner Wiley concurring in the result.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-721

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WILLIAM K. ALEXANDER ET AL., TRANSFEROR and MORTENSON BROADCASTING, INC., TRANSFEREE For Transfer of Control of Woodander Broadcasting Co., Inc.	BTC-7074

JULY 3, 1973.

MORTENSON BROADCASTING, INC.,
619 Peoples Merchants Trust Building,
Canton, Ohio.

GENTLEMEN: This refers to the application for transfer of control of Woodander Broadcasting Company, Inc., licensee of WWLV (FM), Versailles, Ky., from William K. Alexander *et al.* to Mortenson Broadcasting, Inc. (BTC-7074), which was granted today.

The Commission received information that Mortenson Broadcasting was publicizing its proposed acquisition as that of a Lexington, Ky. station with a Lexington address and a copy of Mortenson's proposed rate card which appeared to identify the station with Lexington and which included a "coverage map" appearing to center around Lexington and depicting a service area much larger than that contained within WWLV(FM)'s 1 mv/m contour. Subsequently Mortenson amended its application to explain that the presently authorized studios on Lawrenceburg Road, Versailles "will continue to be used as the studio for WWLV. However . . . we have planned a regional office and studio at 1200 South Broadway in Lexington. . . . Following the approval of the license WWLV will also list the Versailles address on its letterheads, rate cards, and all correspondence. Also, in all ID's and references on the air, Versailles will be identified as the location of WWLV Radio." Mortenson further stated that the rate card was temporary and that it depicted the 50 microvolt contour and that "on the permanent rate cards to be printed, a new map will be used on which the 1 mil will also be included."

You are reminded of the provisions of Sec. 73.1201(b)(3) of the Commission's Rules, which provides, "A licensee shall not in any identification announcements, promotional announcements or any other broadcast matter either lead or attempt to lead the station's audience to believe that the station has been authorized to identify officially with cities other than those permitted to be included in official station identifications. . . ." WWLV(FM) is licensed to Versailles and has not been authorized under the provisions of Section 73.1201(b)(2) to include in its official station identification the name

of any additional community. Any attempt to identify the station with Lexington would be a violation of Sec. 73.1201. You are also reminded of the provisions of Sec. 73.210(a) of the Rules: "(2) The main studio of an FM broadcast station shall be located in the principal community to be served . . . (3) No relocation of a main studio to a point outside the principal community to be served, or from one such point outside the community to another, may be made without first securing a modification of construction permit or license . . . (4) a majority (computed on the basis of duration and not number) of a station's programs or, in the case of a station affiliated with a network, two-thirds of such station's non-network programs, whichever is smaller, shall originate from the main studio or from other studios or remote points situated in the place where the station is located."

The Commission expects that Mortenson will abide by the Rules in the operation of WWLV(FM) and considers Mortenson's amendment to the transfer application dated May 15, 1973 to be a representation that it will comply with these requirements. Accordingly, the Commission has granted the transfer application and contemplates no further action at this time.

Commissioner Wiley concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*